Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ARTHUR GOLDSTEIN and
MEDCO ADMINISTRATORS, LTD.,

Petitioners,

v.

ELAINE L. CHAO, Secretary of Labor,
United States Department of Labor,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

What standard should be applied in determining what constitutes assets of an employee benefit plan governed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA")?

Do fees paid by employers to their collective bargaining representative constitute assets of an employee benefit fund?

Did the Second Circuit fail to apply the correct standard in determining whether the fees paid to Medco Administrators Ltd. ("Medco") were assets of the Solidarity of Labor Organizations Benefit Fund?

Did the Second Circuit deviate so far from the statutory standard to be applied in determining the conduct required to make an individual a fiduciary under ERISA as to call for an exercise of this Court's supervisory power?

Did the Second Circuit depart from the accepted and usual course of judicial proceedings, the Federal Rules of Evidence and Supreme Court precedent in affirming the district court's granting of summary judgment in favor of the respondent Secretary of Labor and against petitioners Medco and Arthur Goldstein ("Goldstein")?

In granting a permanent injunction against Goldstein, did the Second Circuit deviate so far from the remedies allowed under ERISA so as to call for an exercise of this Court's supervisory power?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Medco states that there is no parent or publicly held company that owns 10% or more of the corporation's stock.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion denying petitioners' appeal is unpublished and is attached as Appendix A.

The district court's opinion and order granting respondent's summary judgment motion is unpublished and set forth in Appendix B.

The district court's final judgment and order is unpublished and set forth in Appendix C.

STATEMENT OF JURISDICTION

The Second Circuit's opinion denying petitioners' appeal was entered on September 7, 2000. The Second Circuit's opinion denying petitioners' petition for rehearing was entered on December 22, 2000 and is set forth in Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Retirement Security Act, 29 U.S.C. § 1001, *et seq*. The relevant provisions of ERISA are set forth in Appendix E.

STATEMENT OF THE CASE

A. Medco's Role As The Collective Bargaining Representative Of Its Employer Clients With Respect To Local 947 of the Solidarity of Labor Organizations and the Solidarity of Labor Organizations Benefit Fund

The Solidarity of Labor Organizations Benefit Fund ("Fund") is a jointly administered employee benefit fund created in order to provide medical benefits to employees of employers that are parties to collective bargaining agreements with Local 947 of the Solidarity of Labor Organizations ("Local 947").

Medco is a corporation organized under the laws of the State of New York in April 1991. From its inception through March 1996, Goldstein was the President of Medco.

Commencing in 1991, Medco began entering into agreements with employers, titled "Authorization of Collective Bargaining Representative." These agreements designated Medco as the employers' collective bargaining representative for purposes of their dealings with Local 947. The Authorization of Collective Bargaining Representative provides, at paragraph 1, as follows:

> 1. The undersigned Employer designates the undersigned Administrator [Medco] to serve as its representative for the purposes of collective bargaining with Local 947, Solidarity of Labor Organization (hereinafter Local 947) only with regard to the following matters:
>
> (a) To enter into an Associate Member Collective Bargaining Agreement (hereinafter the Local 947 Agreement) with Local 947, Solidarity of Labor Organization.
>
> (b) To negotiate with Local 947 the contribution amount required to provide single and/or family coverage for its employees in accordance with the rules and regulations of the Solidarity of Labor Organization Benefit Fund.
>
> (c) To negotiate with Local 947 the benefits to be provided by the Solidarity of Labor Organization Benefit Fund based upon the contribution amount agreed to in accordance with paragraph 1(b) (JA-847 at paragraph 1).[1]

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1. "JA_" refers to the Joint Appendix filed with the Second Circuit Court of Appeals and page number thereat.

At the same time Medco began representing employers in connection with their collective bargaining with Local 947, Medco entered into an agreement with the Fund (JA-1071). This agreement provided, in pertinent part, that,

> Medco Administrators, Ltd., is a Health Benefit Consultant and Employer Representative and is a Collective Bargaining Representative ("Employer Representative") on behalf of various employers which have entered into Associate Membership Collective Bargaining Agreements with Local 947, Solidarity of Labor Organizations (JA-1071 at Second "Whereas" clause).

The collective bargaining agreements between Local 947 and the employers whom Medco was retained to represent required the employers to make monthly contributions to the Fund in order for the employers' employees to receive medical coverage through the Fund (JA-848 at paragraphs 5-9). Further, under the collective bargaining agreement, the employer was required to check-off from the wages of its covered employees from whom its had received written authorization, and remit to Local 947, union dues in the amount of $12.00 per month (JA-848 at paragraph 8).

On a monthly basis, Medco received a bill from Local 947 on behalf of each employer whom it represented. The bill listed each employee, the amount that was required to have been checked-off from the employees' wages as Local 947's dues and/or initiation fees, and the amount due from the employer to the Fund as the employer's contribution for its employees' participation in the Fund. The bill also described whether the employee receives single or family coverage based on the rate charged by the Fund. The bill indicated on the bottom to "Kindly Remit Welfare Check to: SOLO Benefit Fund" and to "Kindly Remit Dues Check to: SOLO Local 947" (JA-1073; JA-60 at paragraphs 78, 89).

Upon receipt of this monthly bill from Local 947, Medco prepared and sent a bill to the employers it was retained to represent. This bill reflected the amounts billed to the employer by the Fund and Local 947 as well as an additional amount added by Medco as the fee Medco charged the employer as its collective bargaining representative and in consideration for the services Medco performed in this capacity (JA-60 at paragraphs 79, 89; JA-1598).

Local 947 and the Fund solely determined the amounts that the employers were required to pay to Local 947 and the Fund. It is undisputed that, other than attempting to negotiate the lowest contribution rate possible for its employer clients, neither Medco nor Goldstein played any role whatsoever in the determination by the Fund of the amount the Fund billed Medco's employer clients for the provision of medical benefits. Similarly, It is undisputed that neither Medco nor Goldstein played any role whatsoever in the determination by Local 947 of the amount it required Medco's employer clients to check-off as union dues and initiation fees from their employees' wages and remit to Local 947.

Upon receipt of the bill from Medco, Medco's employer clients then sent to Medco the amounts required to be remitted to the Fund and Local 947 as well as Medco's fee. Medco deposited the entire amount in its bank account. Medco then issued separate checks to the Fund, reflecting the amount the Fund required from the employer in order to provide health benefits to the employer's employees, and to Local 947, reflecting the amount checked-off from the employees' wages as dues or initiation fees (JA-60 at paragraph 86, 89; JA-848 at paragraphs 9 and 10). Medco retained its fee for itself.

In connection with its role as the employer's collective bargaining representative, Medco performed the following important roles for its employer clients in exchange for the fees paid to it:

1. Medco negotiated with Local 947 for the Fund to provide the highest level of medical benefits, at the lowest contribution

rate, with respect to Medco's employer clients (JA-593 at p. 106, lns. 9 through p.108, ln.8; JA-847 at paragraph 2 (c)).

2. Medco received from the employers whom it represented both the contribution amount established by the Fund needed to provide health coverage and union dues and initiation fees, and then sent same, in the proper amounts, to the Fund and Local 947, respectively (A-848 at paragraph 86; A-848 at paragraphs 9 and 10).

3. Medco interfaced with the Fund and assisted Fund personnel in resolving any claims disputes involving the employees of employers whom Medco represented. This would involve speaking directly with the employee involved and interacting with the Fund staff (JA-593 at p. 25, lns. 8-25, p. 26. lns. 2-5, p. 95, ln. 13 through p. 100, ln. 9).

4. Medco ensured that all contributions its employer clients were required to make were timely made and agreed to indemnify the Fund for any delinquent contributions (JA-1071 at paragraph "FIRST").

5. Medco agreed to indemnify the Fund in the event a collective bargaining agreement was terminated without approval by the Fund, in which case Medco may be held liable to the extent the claims paid exceeded the total amount of contributions received by the Fund (JA-1071 at paragraph "Seventh").

6. Medco guaranteed the accuracy of the information provided by its employer clients in their application to participate in the Fund (JA-1071 at paragraph "FIFTH"). Medco also agreed to indemnify the Fund should it suffer any losses in the event employees are enrolled in the Fund who do not meet the definition of an eligible "employee" under the Fund's Trust Agreement.

7. Medco prepared a booklet for its employer clients which described both Medco's role and relationship to the employers as well as the Fund's plan of benefits (JA-888; JA-593 at p. 99, lns. 14-25, p. 100, lns. 2-9).

8. Medco agreed to establish a reserve fund of $100,000 on behalf of its employer clients, to be used to indemnify the Fund to, among other things, "assure the prompt remittance of employer contributions to the Fund when due" (JA-1071 at paragraph "FIRST").

9. Medco was responsible for acting as the agent of its employer clients for all purposes related to their participation in the Fund (JA-848 at paragraphs 1 and 12; JA-847 at paragraph 2 (c)).

B. Proceedings Below

The jurisdiction of the district court was invoked under ERISA, 29 U.S.C. § 1001, *et seq.*

The Secretary of Labor instituted this action alleging that the fees paid to Medco were assets of the Fund. The Secretary of Labor further alleged that, by virtue of the fact that Medco and Goldstein had the ability to establish Medco's fees, Medco and Goldstein exerted sufficient discretionary control over plan assets to be considered fiduciaries of the Fund. The Secretary of Labor alleged that the retention of these fees by Medco constituted a breach of the fiduciary duty owed by Medco and Goldstein to the Fund. The Secretary of Labor sought an order requiring Medco and Goldstein to disgorge all fees paid to Medco by its employer clients.

There is no dispute that neither Goldstein nor Medco held any title or position, such as plan trustee, administrator or investment advisor, which, by its very designation, would confer fiduciary status upon either. Accordingly, Medco or Goldstein can only be liable if the fees paid to Medco by its employer clients were plan assets and Medco and Goldstein were deemed to be fiduciaries of the Fund based upon their exercise of discretion or control over the disposition of plan assets. If Medco's fees are not plan assets, the setting of Medco's fees does not constitute the exercise of discretionary control over plan assets. Accordingly, neither Medco nor Goldstein could then be considered fiduciaries of the Fund. As neither Medco nor Goldstein would then be considered fiduciaries of the Fund,

neither can be held to have owed any fiduciary duty to the Fund or to have breached any fiduciary duty to the Fund.

Neither ERISA nor the regulations promulgated thereunder contain a definition of the term "plan assets" applicable to this case. Nevertheless, the district court held, by way of summary judgment in favor of respondent, that the fees paid to Medco by employers, which had designated Medco as their collective bargaining representative, constituted assets of the Fund. In concluding that Medco's fees are plan assets, the district court employed both a "governing documents" test and a "functional" and economic realities approach. The district court further held that, by virtue of the fact that Medco and Goldstein had the ability to establish Medco's fees, Goldstein and Medco were fiduciaries of the Fund, and that by retaining the fees paid to Medco's by its employer clients, petitioners breached the fiduciary duty they owed to the Fund and engaged in prohibited transactions in violation of ERISA Sections 406(a)(1)(D), 406(b)(1), 404(a)(1)(A), 404(a)(1)(B), and Section 405(a). Consequently, the district court held that Goldstein and Medco were liable to the Fund in the full amount of the fees paid by employers to Medco, a sum totaling $9,525,493.16 plus $2,112.55 interest for each date after June 9, 1999, as restitution to the Fund. The district court further permanently enjoined Goldstein from ever providing any services, as an employee, consultant, vendor or otherwise, to any employee benefit plan.

The Second Circuit affirmed the district court's granting of respondent's summary judgment motion. The Second Circuit rejected petitioners' argument that the fees paid to Medco by its employer clients were not Fund assets "substantially for the same reasons stated in Judge Wood's Opinion and Order . . . analyzing the terms of the documents governing the Fund" (App. B). The Second Circuit also rejected petitioners' argument that substantial factual questions exist which precluded granting respondent's motion for summary judgment. The Second Circuit further denied petitioners' request for a rehearing.

The petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The extension by the Second Circuit of the definition of a "plan asset" to include the fees paid to Medco by employers who designated Medco as their collective bargaining representative raises important questions of federal law that must be decided by this Court. The reasons that support granting petitioners' writ of certiorari are summarized as follows:

1. There exists no consistent or logical standard for determining what constitutes a plan asset. As described *infra*, the "governing documents" analysis applied by the Second Circuit is arbitrary and leads to the inconsistent and irrational definition of plan assets under ERISA.

2. In determining whether Medco's fees constituted assets of the Fund, the Second Circuit considered only the governing documents. The Second Circuit never explained what constitutes the governing documents or what weight was to accorded any particular document.

3. The standard employed by the Second Circuit in determining whether Medco's fees constituted assets of the Fund ignores the functional or economic realities of the parties' relationships. In not considering these factors, the Second Circuit rejected the standard applied by the Ninth Circuit. There thus exists a conflict between the Ninth and Second Circuits as to the test to apply in determining whether monies constitute plan assets.

The consideration of the functional or economic realities of the parties' relationships is essential in determining whether certain monies constitute plan assets. In fact, the respondent Secretary of Labor urged the Second Circuit to adopt this very approach, combining both the governing documents analysis and the functional or economic realities approach, to determine whether Medco's fees are plan assets. In ignoring these relevant factors, the Second Circuit fails to consider the best evidence of the parties' intent and understanding. Accordingly, the correct standard that should be applied combines a consideration of

the governing documents test and the functional or economic realities approach. This approach is imperative in light of the fact that ERISA does not contain a definition of a plan asset as well as in light of the arbitrary and inconsistent results that stem from application of the governing documents test.

4. The Second Circuit deviated so far from the statutory standard to be applied in determining the conduct required to make an individual a fiduciary under ERISA as to call for an exercise of this Court's supervisory power. In holding that Goldstein was a fiduciary, and thus liable to make restitution of all fees paid to Medco from its employer clients, the Second Circuit ignored the express terms of ERISA as well as clear judicial precedent and Department of Labor Regulations which provide that an individual may only be liable as a fiduciary with respect to instances in which he acted as a fiduciary (29 C.F.R. 2509.75-8 FR-16, provides that "The personal liability of a fiduciary who is not a named fiduciary is generally limited to the fiduciary functions which he or she performs with respect to the plan").

In the instant matter, Goldstein may only be held liable as a fiduciary with respect to the instances in which he set the fees paid by employers to Medco. Notwithstanding, Goldstein was held to be a fiduciary with respect to each and every fee paid by employers to Medco despite the fact that the record does not contain evidence that Goldstein set the fees in each instance for which he was held liable.

5. The standard employed by the Second Circuit in determining whether Medco's fees constituted assets of the Fund will inevitably result in fees charged by attorneys and multi-employer associations for representing employees being considered plan assets.

6. This case raises the important question of what standard should be applied in granting summary judgment and whether the Second Circuit correctly applied this standard. In granting summary judgment, the Second Circuit substantially deviated from established judicial precedent.

7. This case raises the important question of what standard should be applied in granting a permanent injunction barring an individual from being involved with an ERISA benefit plan and whether the Second Circuit correctly applied this standard. In granting summary judgment, the Second Circuit substantially deviated from judicial precedent on when a permanent injunction should be granted.

A. The "Governing Documents" Analysis Applied By The Second Circuit Is Ambiguous Thus Leading To Arbitrary And Inconsistent Holdings.

The district court employed two (2) approaches advanced by several other courts in attempting to determine whether or not particular Medco's fees constituted plan assets. The district court considered whether the fees paid by employers to Medco as their collective bargaining representative constituted assets of the Fund from the perspective of both the "governing documents" and based upon a "functional perspective" analysis (JA-1663-1668). In affirming the district court's finding that the fees paid to Medco are plan assets however, the Second Circuit relied "substantially for the same reasons stated in the district court's Opinion and Order . . . analyzing the terms of the documents governing the Fund" (App. A). The Second Circuit thus rejected the consideration of the functional perspective approach utilized by the district court as well as the Ninth Circuit in *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1467 (9th Cir. 1995).

In the subject case, neither the trust agreement nor any of the other relevant documents expressly state that Medco's fees are plan assets. Despite this fact, the Second Circuit, in determining whether Medco's fees constituted plan assets, looked only to certain governing documents to determine if Medco's fees were plan assets.

The standard applied by the Second Circuit in determining whether Medco's fees constituted plan assets is inherently flawed. The governing documents approach is flawed in that it provides no guidance as to the documents the Court must consider or the weight to be given any particular document.

The Court is thus free to select certain documents to consider, while ignoring others, or to consider certain provisions contained in documents while ignoring other equally relevant provisions contained in the same documents. The Second Circuit decision to consider only certain documents, while ignoring others, is arbitrary and leads to the inconsistent and incorrect definition of plan assets under ERISA.

The Second Circuit's approach is also flawed in that it fails to consider the functional or economic realities of the parties' relationships in its analysis. In omitting consideration of these factors, the Second Circuit applied a different standard than applied by the Ninth Circuit in resolving the question of whether certain monies constitute plan assets. Further, in rejecting this approach, the Second Circuit rejected the standard employed by the district court and urged by the Secretary of Labor.

The flaws inherent in the governing documents approach are described below:

1. The Second Circuit failed to consider certain governing documents that support petitioners' position that Medco's fees are not plan assets.

The district court did not consider the Authorization of Collective Bargaining Representative in its review of the governing documents. As the Second Circuit affirmed the district court's holding that Medco's fees are plan assets "substantially for the same reasons stated in the district court's Opinion and Order . . . analyzing the terms of the documents governing the Fund," it is presumed that the Second Circuit similarly did not consider the Authorization of Collective Bargaining Representative in reaching its decision.

The Authorization of Collective Bargaining Representative, entered into between Medco and its employer clients, is the seminal governing document that should have been considered by the district court. It is this document that created and defined Medco's relationship as the employers' collective bargaining representative. The fact that the Second Circuit ignored this

document exposes a fundamental flaw in the approach adopted by the Second Circuit. This omission is especially significant in light of the fact that the Authorization of Collective Bargaining Representative lends important support to petitioners' position that Medco's fees are not plan assets.

The significance of the Authorization of Collective Bargaining Representative to the question of whether Medco's fees are plan assets cannot be overstated. The Authorization of Collective Bargaining Representative states that, as an agent of the employer, Medco was authorized "[t]o negotiate with Local 947 regarding the contribution amount required to provide single and/or family coverage for its employees . . ." (JA-847 at paragraph 1 (b)) as well as "[t]o negotiate with Local 947 the benefits to be provided by the Solidarity of Labor Organization Benefit Fund upon the contribution amount agreed to in accordance with paragraph 1 (b)" (JA-847 at paragraph 1 (c)). The Authorization of Collective Bargaining Representative goes on to state that,

> 2. The Employers contribution amount agreed to in accordance with paragraph 1(b), shall be paid to the Administrator [Medco] on the 15th day of the month prior to the month for which the contributions are due. In addition to the Solidarity of Labor Organization Benefit Fund contributions, the payment shall include Local 947's Associate Membership fees and/or initiation fees, checked off pursuant to written authorization, and the Administrator's [Medco's] administration fee (JA-847 at paragraph 2).

The Authorization of Collective Bargaining Representative thus clearly establishes that Medco's fee was intended to be separate and distinct from the contributions that the Fund required employers pay to it for the provision of health benefits to the employer's employees. This further establishes that Medco's employer clients never believed that Medco's fee was

to be paid to the Fund. Rather, the Authorization proves that the employers understood that Medco's fee was to be the property of Medco.

Further, the Authorization of Collective Bargaining Representative at paragraphs 1(b) and (c), thus clearly contemplates a "contribution amount" which is to be charged each employer by the Fund, and which is required to be paid in order for the Fund to provide benefits to the employer's employees. Paragraph 2 states that the employer is required to send this "contribution amount" to Medco, on a monthly basis, for remittance by Medco to the Fund. Paragraph 2 further provides that "[I]n addition" to the Solidarity of Labor Organization Benefit Fund contributions (i.e., the "contribution amount"), the employer shall pay to Medco, on a monthly basis, the Local 947's fees as well as Medco's fee.

These important aspects of the document, which clearly indicate that Medco's fees are separate and distinct from the "contribution amount" required by the Fund for the provision of medical benefits, were ignored by the district court and the Second Circuit under the amorphous "governing documents" test.

2. The Second Circuit failed to consider important aspects of the documents it did consider in its analysis.

The documents considered by the Second Circuit contain numerous provisions that lend support to petitioner's position that Medco's fees are not plan assets, including the collective bargaining agreement between Local 947 and the employers. As the district court did not consider these provisions, and the Second Circuit's decision is based on substantially the same grounds as the district court's decision, it is presumed that the Second Circuit similarly failed to consider these provisions. The failure to consider these provisions further points out the flaw inherent in the Second Circuit's approach.

The collective bargaining agreement, at paragraph 5, provides that "[t]he Employer agrees that contributions to the SOLO Health and Welfare Fund shall be made . . . in accordance with the schedule of Benefits and the *contribution amount* agreed to between Medco and the Employer" (JA-848 at paragraph 5). It cannot be argued that this provision gave Medco and the employers the right to set the amount of contributions required by the Fund to be paid to it in order to provide health insurance. Under this interpretation, Medco and the employer could, thus, could set this amount at any amount they chose, even zero. The correct interpretation of the meaning of this provision is that Medco and the employer (both of whom were party to the Associate Membership Agreement) had to agree between themselves upon the amount the employer would commit itself to pay to the Fund in order for the Fund to provide health insurance to the employer's employees. One of the reasons for this may well be that Medco, as the employer's agent, had to agree to indemnify the Fund for the employers' failure to pay contributions to the Fund (JA-1071 at paragraph "FIRST").

Further, the use of the term "contribution amount" in this context is consistent with the manner in which that term is utilized in the Authorization of Collective Bargaining Representative. In that document, the term "contribution amount" was shown to refer to the amount required to be paid by the employer to the Fund for the provision of health benefits to the employer's employees.

Moreover, the collective bargaining agreement, at paragraph 8, provides that "[t]he employers contributions shall be made to Medco and shall include the monthly contributions to the SOLO Health and Welfare Fund, Local 947, Solidarity of Labor Organizations Associate membership fees in the amount of twelve (12) dollars, per covered employee per month and a service fee payable to Medco" (JA-848 at paragraph 8). Thus, Medco's fee is set out as being separate from the amount the employer is required to send to the Fund for the provision of medical benefits.

In addition, paragraph 6 of the collective bargaining agreement provides as follows: "6. The amount of the *Employer's contribution* to the SOLO Health and Welfare Fund may be changed by a decision of the Board of Trustees of the SOLO Health and Welfare Fund," upon thirty (30) days written notice to the employer and Medco (emphasis added) (JA-848 at paragraph 6). The same term, *Employer's contribution*, is used in both paragraphs 6 and 8. Applying the meaning the district court gave the term *Employer's contribution* in paragraph 8 (as including the "monthly contributions to the SOLO Health and Welfare Fund," Local 947's dues and Medco's fees), to paragraph 6 would mean that the Fund's Board of Trustees have the right to unilaterally alter both the amount of dues paid to Local 947 as well as Medco's fees. Certainly, this was not agreed to by the parties.

Further support for petitioners' position that Medco's fee were never meant to be a plan asset is found in paragraph 9 of the collective bargaining agreement, which reads as follows: "9. Medco agrees to remit the appropriate monthly amount to the SOLO Health and Welfare Fund within thirty (30) days of receipt of the *Employer's contribution*" (JA-848 at paragraph 9). If, as the district court concluded, the term "*Employer's contribution*" refers to the entire amount received by Medco from the employers, including Medco's fees, why would paragraph 9 require that Medco only remit "the appropriate amount" from the *Employer's contribution*?

Still further support for petitioner's position that Medco's fee was never meant to be a plan asset is found in paragraph 10 of the collective bargaining agreement, which reads as follows: "10. On the first day of the month following receipt of the monthly contributions by the SOLO Health and Welfare Fund, and the Local 947 Solidarity of Labor Organizations Associate Membership fees, employees of the Employer on whose behalf contributions are made will be entitled to benefits . . ." (JA-848 at paragraph 10). Paragraph

10 describes the Fund's "monthly contributions" as being the amount required to be paid by Medco to the Fund. Local 947's dues is referred to separately and no mention is made at all of the receipt by the Fund of Medco's fees as being a condition of providing health insurance. Thus, in paragraph 10, the term "monthly contributions" refers only to the amounts paid to the Fund.

Similarly, paragraph 11 of the collective bargaining agreement provides that an employee's benefits will cease on "the date contributions required on the part of the employee is due and unpaid . . ." (JA-848 at paragraph 11). No mention is made of the receipt by the Fund of Medco's fees as being a condition of providing health insurance.

Paragraph 12 of the collective bargaining agreement also provides as follows:

> 12. In all matters pertaining to this Agreement, Medco shall be acting as the agent of the Employer, and a failure by Medco to remit the Employer's contributions to the SOLO Health and Welfare Fund shall be deemed a failure by the Employer to comply with the contribution requirement set forth above.

(JA-848 at paragraph 12). If, as the district court concluded, the term *Employer's contribution* in paragraph 8 includes the monthly contributions to the SOLO Health and Welfare Fund as well as Local 947's dues and Medco's fees, then, paragraph 12 must be read as meaning that if Medco does not remit to the SOLO Health and Welfare Fund the entire "Employer contribution," coverage will be terminated. This would, according to the district court's analysis, include both Local 947's dues and Medco's fees. There is no evidence to support the contention that payment of union dues is a condition of medical coverage, yet this is the inescapable conclusion of this approach.

B. The Second Circuit's Approach In Determining Whether Medco's Fees Constituted Plan Assets Ignored Consideration Of The Functional Or Economic Realities Of The Parties' Relationships, Thus Resulting In A Conflict With The Approach Adopted By The Ninth Circuit.

In considering whether monies constitute plan assets, the Ninth Circuit has adopted a "twofold functional test . . . (1) whether the item in question may be used to the benefit (financial or otherwise) of the fiduciary, and (2) whether such use is at the expense of the plan participants or beneficiaries." *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1467 (9th Cir. 1995). The Second Circuit did not follow this approach and did not consider the functional and economic realities of their relationships. This test, however, is an essential part of the analysis performed by a court. As the law does not contain a definition of a plan asset, it is necessary that a court consider whether the parties' intended particular monies to be considered plan assets. The Second Circuit, in employing the governing documents test, attempted to determine whether these documents defined the amounts in question as plan assets. Among the best evidence of the parties' intent, however, are the functional and economic realities of their relationship. The flaw in the Second Circuit's failure to apply a functional test is readily apparent in that it ignores significant and relevant factors that must necessarily be examined in order to ascertain the parties' intent as to whether Medco's fees are considered plan assets. Consequently, the application of this limited approach by the Second Circuit results in an inconsistent and incorrect conclusion as to what is considered a plan asset.

The correct standard that should be applied combines a consideration of the governing documents test and the functional or economic realities approach. The Supreme Court must adopt an approach that considers the governing documents that establish the parties' relationship in light of the understanding of the parties involved as to whether Medco's fees constituted

assets of the plan as well as the reality of the manner in which each party acted. The flaw in the Second Circuit's use of only certain governing documents is demonstrated by that Court's failure to examine the functional and economic relationship among the employers, Medco, Local 947 and the Fund.

1. Local 947 understood and agreed that Medco's fees were not plan assets.

Edmund Perez ("Perez") was both a Trustee of the Fund and the President of Local 947 at all relevant times. As President of Local 947, Perez was aware of the terms of the collective bargaining agreement entered into between Medco, the employers Medco represented and Local 947. As described *supra*, the collective bargaining agreement specifically stated that the employer's monthly payment to Medco would, include, "a service fee payable to Medco" in addition to the "monthly contributions to the SOLO Health And Welfare Fund" and Local 947 union dues (JA-848 at paragraph 8). Accordingly, Local 947 unquestionably understood and agreed that Medco's fees are not assets of the Fund.

Further, to accept the Second Circuit's decision, that the total payment made by the employers to Medco constituted plan assets, would lead to the conclusion that Local 947 entered into a collective bargaining agreement which provided that its union dues and initiation fees, checked-off from the wages of its associate members, must also be considered assets of the Fund. Under the reasoning adopted by the Second Circuit, all sums sent by employers to Medco are plan assets. However, included among these amounts, in addition to contributions required by the Fund and Medco's fees, were Local 947 dues checked-off from employees' wages and required to be remitted to Local 947. According to the analysis adopted by the Second Circuit, the union dues sent by employers to Medco and forwarded from Medco to Local 947 are plan assets. Thus, Local 947 officials or even payroll clerks that accepted the union dues and deposited these amounts into Local 947's account are no less Fund fiduciaries than Medco and Goldstein by virtue of the fact they

exercised discretionary control over plan assets. These individuals would then be personally liable to make restitution to the Fund for the union dues and initiation fees they accepted.

Moreover, it would also have been illegal for union dues and initiation fees checked-off from employees' wages to be remitted to the Fund as monies deducted from employee's wages are held in trust for remittance to the union. Further, the Complaint does not allege that Local 947 was required to disgorge the union dues they received under the theory that they are plan assets. The Consent Judgment, which Local 947 entered into to resolve the claims raised against it, with the approval of the district court, did not require that Local 947 pay the union dues to the Fund. The Second Circuit's approach of only looking at governing documents fails to take into the account the practical reality that if Medco's fees are plan assets, then Local 947's dues and initiation fees must also be considered plan assets. This inescapable conclusion stems from the Second Circuit's analysis and serves to point out the inherent flaw in the Second Circuit's approach.

2. Medco's employer clients understood and agreed that Medco's fees were not plan assets.

Medco's fee is clearly disclosed as being separate and apart from the "contribution amount" negotiated by Medco on behalf of its employer clients and required by the Fund to provide benefits to the employer's employees. Thus, a review of this Authorization of Collective Bargaining Representative establishes, beyond any doubt, that Medco's employer clients did not consider Medco's fee to be the property of any entity other than Medco, and that it was intended to be paid to Medco for its services performed for the employer.

3. The Fund understood and agreed that Medco's fees were not plan assets.

The Fund set the contribution rate it required employers to pay in order for their employees to be entitled to receive medical benefits. This amount was designated by the Fund in its bill as

being separate and apart from any amount Medco charged its clients. The Fund only requested or required Medco's employer clients to pay the contribution amount it established and clearly understood and agreed that it was not entitled to any portion of the fee paid by Medco's clients to Medco.

Further, even had Medco tendered to the Fund the fees paid to Medco by employers who it represented, the Fund would not have been permitted to accept these monies as they would have exceeded the contribution level set by the Trustees. The Fund billed each employer a certain amount, as set forth on the monthly invoices for each employer sent to Medco. The Trustees would have been committing a breach of their fiduciary duty by accepting any amounts in excess of the contribution rate established and billed by them. In fact, the Second Circuit recently issued a decision in *Trustees of the National Automatic Sprinkler Pension Fund v. Fairfield County Sprinkler Company, Inc.*, __ F.3d__ (2001 WL 246383 (2d Cir 2001) in which it held that an employee benefit fund cannot accept monies, and the employer cannot pay monies to the benefit fund, under Section 302(c) of the Labor Management Relations, 29 U.S.C. § 186(c)(5)(B), where there is no agreement which provides for the payment of contributions. The holding in that case is inconsistent with the Second Circuit holding that Medco's fees must be paid to the Fund. It is illogical for the Second Circuit to require petitioners to pay to the Fund amounts representing Medco's fees that, had Medco tendered these amounts to the Fund at the time Medco received them, the Fund would not have been permitted to accept.

Applying the functional test approved by the Ninth Circuit, as the Fund never intended to be the recipient of Medco's fees, nor entitled to receive them, the retention of Medco's fees by Medco itself was not "at the expense of plan participants or beneficiaries." *Kayes v. Pacific Lumber Co.*, 51 F.3d at 1467.

Under the Second Circuit's reasoning, lawyers and other employer representatives, including multi-employer associations, could be fiduciaries. Lawyers and other

representatives typically negotiate contracts and settlements with employee benefit funds and charge fees for their services. Fees that an attorney receives from his client for settling a case involving a claim by a benefit fund that his client owes fund contributions to could be a plan asset. Clearly, Congress never intended that all fees paid to employer representatives are plan assets.

The Second Circuit's decision to reject the functional realities test adopted by the Ninth Circuit, and supported by the respondent Department of Labor, results in the formulation of an illogical test, with monies being considered plan assets which none of the parties, including the Fund and the participants of the Fund, intended and agreed were plan assets. Examining the functional realities, along with the governing documents, is the only way to reach a fair and consistent conclusion as to whether certain amounts constitute plan assets.

Therefore, it is important that the Supreme Court establish a standard that adopts the economic and practical realities of the parties' relationship and which is consistent with ERISA and the Labor Management Relations Act, and which reflects what the parties intended.

The Secretary of Labor clearly objected to Medco receiving fees from its employer clients. Since this arrangement does not violate any federal statute or regulation, the Secretary of Labor was compelled instead to construct a "bootstrap" theory by which Medco's fees are defined as plan assets despite the fact that the majority of the provisions of the governing documents do not support this conclusion as well as the reality of the parties' relationships.

C. The Second Circuit Misinterpreted And Misapplied The Law Regarding The Conduct That Makes An Individual A Fiduciary Under ERISA.

ERISA defines an individual to be a fiduciary "to the extent" he exercises discretionary authority or control regarding the disposition of plan assets. ERISA Section 3(21). Courts have

held that "[u]nder this definition, a person may be an ERISA fiduciary with respect to certain matters but not others, for he has that status only "to the extent" that he has or exercises the described authority or responsibility *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993). The Secretary of Labor also has adopted regulations, under, 29 C.F.R. 2509.75-8 FR-16, which provides that "The personal liability of a fiduciary who is not a named fiduciary is generally limited to the fiduciary functions which he or she performs with respect to the plan." In this case, however, the Second Circuit has found that Goldstein is a fiduciary in all instances in which Medco collected a fee even where there is no evidence that he acted as a fiduciary in each and every such instance.

The district court held that

> [b]ecause the Court finds that the amount of the employers' contributions paid to Medco constitute assets of the Fund and because defendants had set the total sum of the contributions employers had to pay (over and above the coverage rate set by the Fund and the union membership fee set by Local 947) the Court further concludes that defendants are fiduciaries within the meaning of ERISA.

(JA-1668). The district court held Goldstein was personally liable to pay to the Fund all fees paid by employers to Medco (JA-1748). Since Goldstein was not a named fiduciary of the Fund, however, Goldstein could only be held to be a fiduciary "to the extent" he acted as a fiduciary *in a particular case*. In requiring that Goldstein be personally liable to pay to the Fund all fees paid by employers to Medco, the district court concluded that Goldstein *personally* set Medco's fee in each and every instance in which Medco collected a fee.

In their argument to the Second Circuit, the petitioners stated that there was no evidence that Goldstein set the fee in each and every case and that Goldstein could only be liable

for the fees that he set. The only evidence before the District Court, and upon which the Secretary of Labor relied upon, that Goldstein set the fees paid by employers to Medco, was contained in Goldstein's deposition testimony. The relevant portion of the transcript cited by the Secretary of Labor is as follows:

> Q. Who determined what the additional amount would be for what's referred to in that paragraph as the service fee payable to Medco?
>
> A. Who would determine that?
>
> Q. Yes.
>
> A. Medco?
>
> Q. And who at Medco would have determined that *at that time*? (emphasis added).
>
> A. Me.

It is entirely the answer provided by Goldstein, "Me," to the question, "[a]nd who at Medco would have determined that [Medco's fee] *at that time*?" [emphasis added], upon which the Secretary of Labor argued, and the district court held, that Goldstein personally determined the amount of Medco's fee for the entire period for which he was held liable, March 1, 1991 through February 28, 1997 and, accordingly, that he was liable to pay to the Fund all fees paid to Medco during this period.

The question which arises is what time frame was the questioner referring to when the question was asked "[a]nd who at Medco would have determined that [Medco's fee] *at that time*?" [emphasis added]. Moreover, when an attorney asks a witness to recall events as they existed at a particular time ("*at that time*?"), it is a discrete time period they are referring to, at the exclusion of other periods of time. In such a case, the answer provided by Goldstein is limited to the parameters of the question and may not be read to indicate that he set Medco's fee for any period of time other than that period posed in the

question. At minimum, an ambiguity exists as to the time frame the questioner was referring to, as well as the time frame that the deponent, Goldstein, believed he was being asked. In addition, Goldstein's deposition was on July 18, 1996. Goldstein, however, was found liable through February 28, 1997, a period after his deposition. There is no evidence at all about Goldstein setting the fees after his deposition.

What is beyond argument is that Goldstein's answer to the question does not indicate that Goldstein set Medco's fees at all times and in each and every instance. The petitioners believe that ERISA, under Section 3(21), and the Department of Labor Regulations, under, 29 C.F.R. 2509.75-8 FR-16, require that in order for a party to be a fiduciary, the party must have acted as a fiduciary in that instance. In the case at bar, the Second Circuit has found that Goldstein is a fiduciary in all instances because he may have set the fees in some instances. This holding by the Second Circuit is in contradiction to ERISA and the Department of Labor Regulations.

The Second Circuit also acted in contradiction to prior holdings of this Court that summary judgment is inappropriate when there are genuine triable issues of fact that can only be resolved by the trier of fact. At minimum, there are triable issues of fact as to whether Goldstein set Medco's fees in all instances for which he was held liable. The Secretary of Labor cannot use a motion for summary judgment to avoid being required to prove that Goldstein set Medco's fees in each and every instance. Goldstein cannot be held liable, and cannot be required to make restitution of Medco's fees, with respect to instances in which he did not set Medco's fees.

D. The Second Circuit Deviated So Far From The Standard To Be Applied In Consideration Of A Summary Judgment Motion As To Call For An Exercise Of This Court's Supervisory Power.

Summary judgment is appropriate when there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. 56(c). "The inquiry performed is the threshold inquiry of determining whether there is a need for a trial-whether, in other words, there are any genuine issues that can be properly resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A material fact is one that would affect the outcome of the litigation. *Id.* at 248. Further, in considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [its] favor." *Id.* at 255. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* at 255. In making the inquiry, a court "must review the record as a whole." (citation omitted). *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 131, 150-151 (2000).

As indicated above, the petitioners contend that the Second Circuit did not examine "the record as a whole." *Id.* There are several documents, which were described *supra*, that indicate that the Medco's fees were not plan assets. If these documents are examined as a part of the record, summary judgment must not be granted. The Second Circuit, however, may never have even examined these documents because it never indicated or defined the term "governing documents." It is not clear what documents the Second Circuit believed are governing documents or documents that it examined.

In addition, the petitioners contend that the Second Circuit did not draw all reasonable inferences in favor of petitioners regarding whether Medco's fees constitute plan assets. This includes, as discussed, *supra*, the fact that the Second

Circuit ignored several documents and ignored provisions in several documents, which it considered, that indicate that Medco's fees were for services it rendered to the employer and not plan assets. These documents create a reasonable inference that Medco's fees were not plan assets.

E. The Second Circuit Deviates So Far From The Remedies Allowed Under ERISA In Granting A Permanent Injunction Against Goldstein As To Call For An Exercise Of This Court's Supervisory Power.

The District Court ordered broad and sweeping permanent injunctive relief against Arthur Goldstein and Medco. Petitioners argued to the Second Circuit that the petitioners' conduct was not so egregious as to require a permanent injunction. The petitioners further argued that, at minimum, there were triable issues of fact as to whether their conduct was egregious. The Second Circuit rejected the petitioners' arguments.

The injunction prevents petitioners from serving as fiduciaries, consultants, vendors, or service providers. This relief enjoined Goldstein and Medco from, *inter alia*, ever "receiving compensation . . . or anything of value from an employee benefit plan"; "[s]oliciting on behalf of himself or others, any person" involved in an employee benefit plan concerning the operation of the plan; "making any recommendation to, providing any advice to" any person involved in an employee benefit plan, concerning the employee benefit plan" (JA-1750-1). This injunction, in effect, bars Goldstein from being employed by any entity that performs services for any employee benefit plan or from engaging in any transactions involving an employee benefit plan.

Since an injunction, such as one against Goldstein, virtually bars an individual from being employed in a field which was his livelihood, the Supreme Court must adopt a standard that only egregious violations of ERISA warrant a permanent injunction. The Supreme Court should hold that there must be a hearing held before a permanent injunction is issued where

there are triable issues of fact regarding whether an individual engaged in such egregious conduct.

In the instant case, a Consent Judgment was entered against the Fund's Trustees and other fiduciaries as well as with officials of Local 947, named as defendants in the Complaint. This Consent Judgment placed no bar whatsoever from them acting as fiduciaries or Trustees with ERISA in the future. Perhaps more remarkably, the Consent Judgments do not remove any of these individuals from continuing in their roles as Trustees and fiduciaries on behalf of the Fund (JA 1631). Goldstein and Medco's conduct, thus, cannot be so egregious that it warrants a lifetime ban where the Consent Judgments do not require the removal of individuals who served as Trustees and fiduciaries.

Moreover, Goldstein and Medco did not hide their conduct. Medco's right to its fees was clearly set forth in written agreements, numerous invoices and was clearly understood by all parties. This is not an egregious case in which Goldstein should be denied the opportunity for a lifetime to be employed in a field in which he worked for many years.

The Second Circuit indicated in *Beck v. Levering*, 947 F.2d 639, 641 (2d Cir. 1991) that a permanent injunction can only be granted to bar a party from being involved with benefit funds if that party engaged in egregious conduct. In the case at bar, however, the record does not establish that the petitioners engaged in this type of egregious conduct.

In addition, there must be a hearing before a permanent injunction is granted where there are triable issues of fact regarding whether the individual engaged in egregious misconduct. No matter what standard the Second Circuit employed, the Second Circuit failed to examine the record as a whole and draw all reasonable inferences in favor of the petitioners that a permanent injunction was not warranted. As indicated above a permanent injunction was not issued against the Funds's trustees and Local 947 officials. At minimum, a hearing is required in this case on whether a permanent injunction should be issued.

CONCLUSION

The Supreme Court must grant certiorari. This case raises important issues which must be resolved regarding what constitutes plan assets and whether a person can be found to be a fiduciary in all instances when there is evidence, at most, that he acted as a fiduciary in only some instances. In addition, this case also raises an important issue of when it is appropriate to grant summary judgment. The case further raises the important issue of when it is appropriate to grant a permanent injunction.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED SEPTEMBER 7, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: August 31, 2000 Decided: SEP -7 2000)

ALEXIS M. HERMAN, Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellee,

– v. –

ARTHUR GOLDSTEIN and MEDCO
ADMINISTRATORS, LTD.,

Defendants-Appellants.

Before: KEARSE, JACOBS, and STRAUB, *Circuit Judges*.

* * *

Per Curiam:

Defendants Arthur Goldstein and Medco Administrators, Ltd. ("Medco"), appeal from a final judgment of the United States District Court for the Southern District of New York, Kimba M. Wood, *Judge*, (a) ruling that they violated the Employee Retirement Income Security Act of 1974,

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29 U.S.C. § 1001 *et seq.* (1994) ("ERISA"), by withholding sums, unilaterally determined by defendants to constitute Medco's fees, from contributions made by employers to the Solidarity of Labor Organizations Health and Welfare Fund ("Fund") to obtain employee health benefits, (b) ordering defendants to disgorge $9,525,493.16, plus interest dating from June 9, 1999, on account of their violations, and (c) permanently enjoining defendants from, *inter alia*, serving as fiduciaries or service providers to any ERISA-covered employee benefit plan. On appeal, defendants contend principally that such sums as they determined were their fees did not constitute Fund assets, and that in any event, they were not fiduciaries of the Fund within the meaning of ERISA.

We reject the contention that the moneys defendants withheld were not Fund assets substantially for the reasons stated in Judge Wood's Opinion & Order, reported at *Metzler v. Solidarity of Labor Organizations Health & Welfare Fund, et al.*, 1998 WL 477964, at *5-7 (S.D.N.Y. 1998), analyzing the terms of the documents governing the Fund. We reject the contention that defendants were not Fund fiduciaries, given our decision in *United States v. Glick*, 142 F.3d 520, 527-28 (2d Cir. 1998) (agent who exercises "unhampered discretion in setting [his own] commission rate" is a fiduciary). We see no error in the district court's determination that defendants' conduct violated ERISA.

We have considered all of defendants' contentions on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 10, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 Civ. 7247 (KMW)

CYNTHIA A. METZLER, Acting Secretary of Labor, United States Department of Labor,

Plaintiff,

– against –

SOLIDARITY OF LABOR ORGANIZATIONS HEALTH AND WELFARE FUND; EDMUNDO PEREZ; PEDRO LOPEZ; WILLIAM FAGELLO; PHILIP VERO; ARTHUR GOLDSTEIN; SOLIDARITY OF LABOR ORGANIZATIONS, LOCAL UNION 947; ASSOCIATE MEMBERS ADMINISTRATIVE SERVICES, INC.; and MEDCO ADMINISTRATORS, LTD.,

Defendants.

OPINION & ORDER

WOOD, U.S.D.J.

The Department of Labor (the "DOL")[1] sues under the Employee Retirement Income Security Act of 1974

1. Robert B. Reich, former Secretary of Labor, originally filed this action. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Cynthia A. Metzler has been automatically substituted as plaintiff.

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("ERISA"), 29 U.S.C. 1001 *et seq.*, to enjoin acts and practices of defendants Medco Administrative Services, Ltd. ("Medco") and Arthur Goldstein ("Goldstein"), President of Medco, that allegedly violate Title I of ERISA, and to halt the extraction of fees by defendants from contributions made by employers to obtain employee health benefits from an employee benefit plan. The DOL also requests an order directing the return of previously extracted fees and barring defendants from engaging, directly or indirectly, in any transactions with ERISA-covered employee welfare benefits plans. Before the Court are cross motions for summary judgment. For the reasons stated below, plaintiff's motion is granted in part and denied in part and defendants' motion is denied in its entirety.

I. *Procedural History*

The DOL commenced this action on August 31, 1995 against defendants Solidarity of Labor Organizations Health and Welfare Fund ("SOLO Benefit Fund" or the "Fund"); Edmundo Perez and Pedro Lopez, trustees of the SOLO Benefit Fund; William Fagello, administrator of the plan; Solidarity of Labor Organizations, Local Union 947 ("Local 947"), the union sponsor of the SOLO Benefit Fund; Associate Members Administrative Services, Inc. ("AMAS"), the exclusive Employer Collective Bargaining Representative with respect to the SOLO Associate Membership Program; and Philip Vero, President of AMAS; Medco, and Goldstein. On February 27, 1997, the Secretary filed Consent Judgments with this Court as proposed final dispositions of the Secretary's complaint with respect to all defendants except Medco and Goldstein. Plaintiff Metzler

now moves for summary judgment and injunctive relief against Medco and Goldstein, and defendants Medco and Goldstein cross-move for summary judgment dismissing the complaint in its entirety.

II. *Factual Background*

The SOLO Benefit Fund was established on March 31, 1985 by Local 947, and two employers, Dress Up and Home Care Industries, Inc., both of whom had preexisting collective bargaining agreements with Local 947.[2] According to the Solidarity of Labor Organizations Welfare Trust Agreement (the "Trust Agreement"), the Fund was established to provide hospital and medical coverage to eligible employees and was to be jointly administered by representatives of Local 947 and employers. (Pl. Exh. 6.) Due to shrinkage of union membership in 1989, the trustees of the Fund instituted an "associate membership program," whereby Local 947 entered into contracts with employers of so-called "associate members" for the sole purpose of providing health benefits through the union employee welfare benefit plan, the SOLO Benefit Fund. However, these contracts did not cover other employment issues such as wages, hours, and terms and conditions of employment. In addition to these direct negotiations with employers, Local 947 also began to work through so-called "employer collective bargaining representatives" ("ECBRs") in the latter half of 1990. An ECBR, after contracting with the Fund to serve in such a

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2. Unless otherwise indicated, the facts in this section are taken from those portions of plaintiff's statement of material facts undisputed by defendants.

capacity, would then enter into separate contracts with employers, which authorized the ECBR to negotiate an "Associate Membership Agreement" on behalf of an employer with Local 947 for the benefit of its employees. Under the terms of the Association Membership Agreement, which was signed by Local 947, the employer, and the ECBR, the employer's recognition of Local 947 as the collective bargaining representative of its employees was expressly limited to "matters arising from participation of its employees resulting from the operation and administration of the SOLO Health and Welfare Fund, and for no other matters." (*See* Pl. Exh. 11; Pl. Exh. 23.)

From 1990 to 1992, Perez, while employed as Assistant Fund Administrator, selected those entities that would be permitted to market the health benefits of the Fund to employers. The first such entity was The Phoenix Agency, whose president, Dennis Grasso ("Grasso"), was an insurance broker and the employer of a daughter of Perez. During 1990 and 1991, Grasso solicited and enrolled employees to receive health benefits from the Fund as associate members of Local 947. In December 1990, Perez executed a memorandum of agreement with Associate Benefit Agency ("ABA") — a company created by Tracey Perez, another daughter of Perez who was also an employee of the Fund, and whose fiancee, Philip Vero, was made Vice President and Manager of ABA — to allow ABA to bring employers it represented as a collective bargaining representative to participate in the Fund. (Pl. Exh. 18.) After being advised by lawyers that Tracey Perez's involvement with ABA while employed by the Fund was problematic, Philip Vero formed a new

corporation, AMAS,[3] which was then recognized by the Fund's Board of Trustees as the "liason for the associate membership enrollment" on or about January 8, 1991 (Pl. Statement at ¶41; Pl. Exh. 19.)[4] On or about May 2, 1991, Perez and Philip Vero executed a memorandum of agreement under which AMAS was permitted to solicit employers for participation of their employees in the Fund through the associate membership program. On April 1, 1992, AMAS enrolled itself in the Fund's associate membership program as a participating employer, resulting in its employees receiving health benefit coverage from the Fund.

In or around March 1991, defendant Medco,[5] entered an agreement with the AMAS, under which AMAS granted Medco "access" to the Fund "for the purpose of acquiring Associate Members." (Pl. Exh. 36.) The agreement further provided that AMAS would receive a fee from Medco in the amount of $7.00 per month for each employee Medco enrolled in the Fund who obtained individual coverage, and

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3. Philip Vero was also the owner and President of AMAS.

4. On or about April 30, 1991, Philip Vero notified Local 947 that ABA was assigning its rights under its agreement with Local 947 to AMAS, and that any employers that the ABA had obtained for participation in the Fund's associate membership program would be handled by AMAS.

5. From its inception to March 1996, Goldstein served as President of Medco. The present President of Medco is Goldstein's brother, Arthur Goldstein. The only shareholders of Medco are Goldstein's spouse and sister-in-law.

$14.00 per month for each employee obtaining family coverage. At about the same time Medco and AMAS executed this agreement, Medco also entered an agreement with Perez, under which Medco was authorized to solicit employees for participation in the Fund's associate membership program. In addition to soliciting employers for participation of their employees in the Fund, Medco also enrolled itself in the Fund's associate membership program as a participating employer in March 1993, resulting in its employees receiving health benefit coverage from the Fund.

Medco's role in soliciting employers for the Fund's associate membership program can be summarized as follows. An interested employer was first required to execute an Authorization of Collective Bargaining Representative," naming Medco as the employer's "Collective Bargaining Representative." The Medco representative would then provide employers with application forms as well as medical history questionnaires to be completed and signed by participating employees. These forms were then forwarded to the Fund for assessment of the employees' medical history. If an employer's employees met the criteria established by the Fund, the Medco representative then presented that employer with an Associate Membership Agreement for its signature. The Fund was not a party to the Associate Membership Agreement; only the employer, Local 947 and Medco were parties to this agreement. However, under the Associate Membership Agreement, the employer agreed to be bound by the terms of the Trust Agreement and the rules and regulations governing the operation of the Fund, and to accept the decisions of the Fund's Board of Trustees as final and binding upon the employer and its employees. (*See* Pl. Exh. 11.)

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The billing procedure contemplated under the Associate Membership Agreement can be described as follows. A participating employer was required to make contributions to the Fund on behalf of all its employees "in accordance with the Schedule of Benefits and the contribution amount agreed to between Medco and the Employer." (*Id.*) The Associate Membership Agreement directed the employer to pay its monthly contribution to Medco and specified that this amount includes "the monthly contributions to the SOLO Health and Welfare Fund, Local 947, Solidarity of Labor Organizations Associate Membership fees in the amount of twelve (12) dollars per covered employee per month pursuant to written authorization, and a service fee payable to Medco." (*Id.*) The monthly fees for coverage and Associate Membership in Local 947 were set by Fund's trustees and Local 947, respectively. Goldstein and Medco determined the amount of the service fee. The bill Medco sent to each participating employer did not specify the amount of the employer's total monthly contribution which constituted Medco's fee.[6] Upon receiving the lump sum of the employer's monthly contribution, Medco would deposit the payment in its own account and from such account issue a check to the Fund reflecting the amount charged for the provision of benefits, and a check to Local 947 reflecting the amount charged for association membership. Medco retained the balance as its fee.[7]

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6. Medco altered the statement sent to employers in November 1995, so that it indicated the percentage of the total amount due going to each of the following: union dues, benefit fund contribution, "service & organization," and "administration & billing." (Pl. Exh. 46.)

7. In those instances where Medco used an outside salesperson to enroll employers, Medco paid a commission to the salesperson (Cont'd)

Appendix B

III. *The Parties' Contentions*

In its motion for summary judgment, DOL takes the position that the essential factual elements needed to establish defendants' violations of ERISA, as alleged in the complaint, are not in dispute. Because defendants determined the total amount of the employer's monthly contribution and retained a portion of the employer's payment, DOL argues, defendants exercised authority and control over employee welfare benefit plan assets and are thus fiduciaries as defined by ERISA. 29 U.S.C. § 1002(21). DOL further contends that defendants are parties in interest within the meaning of ERISA, because (1) they are fiduciaries, § 3(14)(A), and (2) Medco is an employer of employees covered by the Fund and Goldstein was the President of Medco, §§ 3(14)(C) and (H). DOL maintains that the pleadings, depositions, and exhibits in the record clearly establish that defendants: (1) breached their fiduciary duty of loyalty by not acting solely in the interest of the participants and beneficiaries of the Fund, and for the exclusive purposes of providing benefits to them and defraying reasonable expenses of administering the Fund, in violation of § 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A); (2) failed to act with the care, skill, and diligence of a prudent man acting in a similar capacity, in violation of § 404(a)(1)(B) of ERISA, 29 U.S.C.

(Cont'd)
out of the money it retained from the employer's monthly contribution payment to Medco. If the salesperson who solicited the employer on behalf of Medco used an agent, a commission was paid by the salesperson to that agent out of the commissions the salesperson received from the marketer. A portion of the amount retained by Medco also was used to pay access fees to AMAS.

§ 1104(a)(1)(B); (3) engaged in "prohibited transactions" by receiving plan assets for their own benefit, in violation of §§ 406(a)(1)(D) and (b)(1) of ERISA, 29 U.S.C. §§ 1106(a)(1)(D) and (b)(1); and (4) breached their fiduciary duties as co-fiduciaries, in violation of § 405(a) of ERISA, 29 U.S.C. § 1105(a).

In their motion for summary judgment, defendants agree that there are no material facts in dispute, but insist that the record supports their position that they cannot be held fiduciaries under ERISA. They contend that Medco performed a "non-discretionary, ministerial function, namely, dividing the amount received from employers into its contractually determined constituent parts." Moreover, they maintain that the monies retained by Medco from employer contributions as its "collective bargaining representative fee" (the "ECBR fee") were not an "assets of the plan" within the meaning of ERISA. According, they argue, defendants cannot be construed as "fiduciaries" within the meaning of ERISA, because they were never appointed to positions as fiduciaries and neither had nor exercised discretionary authority over the disposition of any plan assets. Defendants contend that, because DOL cannot establish that defendants were ERISA fiduciaries, the complaint in this action must be dismissed.[8] In addition, they submit that the Fund has suffered no monetary damages as a result of defendants' representation of employers participating in the Fund; defendants' remitted to the Fund the full coverage rate required under the Associate Membership Agreement,

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8. Defendants further insist that the material facts establish that the Fund has suffered no monetary damages as a result of Medco's representation of employers participating in the Fund.

"which was not only enough for the Fund to provide the benefits but also allowed for a tremendous increase in the new assets of the Fund." (Def. Mem. at 10.)

IV. *Discussion*

A. *Summary Judgment Standard*

On a motion for summary judgment, a court "cannot try issues of fact; it can only determine whether there are issues to be tried." *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 58 (2d Cir. 1987) (citations and internal quotation marks omitted). To prevail on a motion for summary judgment, the moving party therefore must show that there are no such genuine issues of material fact to be tried, and that he or she is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Citizens' Bank v. Hunt*, 927 F.2d 707, 710 (2d Cir. 1991). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion," which includes identifying the materials in the record that "it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323. Once a motion for summary judgment is made and supported, the non-moving party must set forth specific facts that show that there is a genuine issue to be tried. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). Although a court considering a motion for summary judgment must view all evidence in the light most favorable to the non-moving party, and must draw all reasonable inferences in that party's favor, *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 572 (2d Cir. 1993),

the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). If, based on the submissions to the court, no rational fact-finder could find in the non-movant's favor, there is no genuine issue of material fact, and summary judgment is appropriate. *See Anderson*, 477 U.S. at 250.

B. *Fiduciary Status*

ERISA permits suits for breach of fiduciary duty only against a person who acts as a fiduciary with respect to a plan or trust covered by ERISA. *Acosta v. Pacific Enterprises*, 950 F.2d 611, 617 (9th Cir. 1992). Section 3(21) of ERISA provides, in pertinent part, that a fiduciary is anyone who:

> (i) . . . exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) . . . renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) . . . has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). The inquiry of the Court is guided by the principle that Congress intended this statutory definition to be broadly construed. *Lopresti v. Terwilliger*, 126 F.3d 34, 40 (2d Cir. 1997) In determining whether

fiduciary status should be assigned to an individual or entity, the primary focus is on the functions performed rather than the formal title held by that individual or entity. *Blatt v. Marshall and Lassman*, 812 F.2d 810, 812 (2d Cir. 1986); *see also Acosta*, 950 F.2d at 618 (concluding that language of § 1002(21)(A) clearly indicates that "a person's actions, not the official designation of his role, determine whether he enjoys fiduciary status"); *Galgay v. Gangloff*, 677 F. Supp. 295, 302 (M.D. Pa. 1987) (noting legislative history reveals Congress sought "to codify the traditional principles of fiduciary responsibility from the law of trusts" and "adopted a broad, functional definition of the term" in order to further this purpose). Courts have stressed that a person need not have "absolute discretion with respect to a benefit plan to be considered a fiduciary." *Blatt*, 912 F.2d at 812; *see also American Federation of Unions v. Equitable Life Assurance Soc'y*, 841 F.2d 658, 663 (5th Cir. 1988). Fiduciary status is properly assigned where an individual or entity is shown to exercise "any authority or control respecting . . . diposition of [a plan's] assets." *Blatt*, 812 F.2d at 813.

As both parties recognize, defendants' liability under ERISA hinges on the question of whether or not the monies retained by Medco as its ECBR fee constitute "plan assets" within the meaning of ERISA. For if defendants exercised no authority or control respecting the management or disposition of any plan assets they are not "fiduciaries" within the meaning of ERISA and cannot be subject to the standards of conduct ERISA imposes on fiduciaries.

The ERISA statute provides no definition of the term "plan asset," and the DOL has not defined the term by

regulation in the context of employer contributions on behalf of employees for health benefits. However, the regulations do provide that determinations of what constitutes a plan asset should be "based on ordinary notions of property rights under non-ERISA law and the terms of any contract to which the plan is a party." *See* Proposed Regulating Relating to the Definition of Plan Assets, 50 Fed. Reg. 961 (January 8, 1985) at 962. As plaintiff correctly notes, courts have adopted two approaches to deciding what constitutes a plan asset: (1) a documentary approach, looking to the documents governing the relationship between the Fund and the employers as the foundation for determining whether the item at issue is an asset of the plan, *see, e.g. Galgay*, 677 F. Supp. at 301, and (2) a functional approach, assessing whether the item in question "may be used to the benefit (financial or otherwise) of the fiduciary at the expense of plan participants or beneficiaries." *See, e.g., Acosta*, 950 F.2d at 620. After reviewing the record in this case, the Court finds that both of these approaches lead to the same conclusion: that the moneys received from employers and retained by Medco constitute assets of the Fund.

1. Analysis of governing documents

Defendants contend that the moneys with which they were dealing when they set the amount of the ECBR fee were not assets of the Fund. Without citing any specific language from any of the documents governing the relationship between employers and the Fund, defendants generally maintain that the "existence" of the ECBR's fee was disclosed to all parties as an amount collected from employers in addition to the coverage rage and that the Fund

thus has no "right" to the fees retained by Medco. However, plaintiff has pointed to language in the Trust Agreement and the Associate Membership Agreements which it argues establish that the total amount of the employer contribution paid to Medco is an asset of the Fund.

In reviewing these documents, the Court observes that Section 2.19 of the Trust Agreement defines "Trust Fund" to mean "the Trust herein established and the sum of the contributions made by the contributing party and held by the Trustee in a trust created hereby, increased by the profits and income thereon and decreased by any losses and reasonable expenses incurred in the administration of the Trust and any payments made therefrom under the Plan." (*See* Pl. Exh. 6, 7.)[9] Moreover, section 3.1 of the Trust Agreement defines "contributions to the Trust" as payments made by participating employers "in the amounts set forth in their agreements with the Union for the services in said Agreements provided." (*Id.*) These agreements, styled as Associate Membership Agreements,[10] identify the employer's "contributions to the Solo Health and Welfare

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9. More specifically, the Trust Agreement provides that "all expenses and charges incurred in the administration and operation of the Health Care Plan and Trust Agreement, the Administrators or other agents or professionals employed or retained pursuant hereto, shall be paid out of the assets of the Trust Fund. (*Id.*)

10. As noted above, under these Associate Membership Agreements employers agreed to be bound by the provisions of the Trust Agreement and the rules and regulations governing the operation of the Fund and the decisions of the Board of Trustees of the Fund. (Pl. Exh. 11.)

Fund . . . on behalf of all employees" as the payment made "in accordance with the Schedule of Benefits and the contribution amount agreed to between Medco and the employer." (Pl. Exh. 11.) The Associate Membership Agreements further provide that this "contribution amount" includes the following components: "monthly contributions to the SOLO Health and Welfare Fund, Local 947, Solidarity of Labor Organizations Associate Membership fees . . . and a service fee payable to Medco." (*Id.*)

Insofar as the Associate Membership Agreements set out these components, this case may be thus be distinguished from *In re Consolidated Welfare Fund ERISA Litigation*, 839 F. Supp. 1068 (S.D.N.Y. 1993), where the agreements signed by employers made "no mention of the deduction of commissions or fees from the stated contribution rates." *In re Consolidated*, 839 F. Supp. at 1073. Yet the "service fee payable to Medco" was defined as a component of the "employer's contributions," which may fairly be construed from the other governing documents described above to constitute assets of the Fund. Moreover, the Court notes that the summary plan description provided to employee participants[11] and the invoices sent to clients[12] fail to make

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11. The summary plan description states:

> The SOLO Benefit Fund is a Fund that is jointly administered by an equal number of management and union Trustees for the sole benefit of Fund members. The Fund is financed by contributions made by Employers to benefit their employees. . . . The Fund makes no profit because it is a Trust Fund. Because it is

(Cont'd)

any reference to the fees and commissions deducted by Medco from the stated employer contribution rates. Viewing the governing documents and taking these additional considerations into account, the Court concludes that the contractual language in this case establishes that the total amount of the monthly employer contributions paid to Medco constituted assets of the Fund.

2. "Assets of the Plan" from a Functional Perspective

Defendants' arguments fare no better when the question of what constitutes an asset of the Fund is considered from a functional perspective. Courts following this approach have been guided by the legislative history of ERISA, which reveals that "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." *Massachusetts Mut. Life Ins. Co. v. Russell*,

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(Cont'd)

> administered efficiently and honestly, the members can derive greater benefits from it than they could from any commercial enterprise or benefits company.

(Pl. Mem. at 19.)

12. As noted above, the invoice was altered in 1995 to delineate the components of the employer contribution, indicating what percentage of the total amount due went to the union dues, benefit fund contribution, "service and organization" and "administration and billing." However as plaintiff rightly notes, the revised version still failed to indicate the amount Medco deducted as its fee; it is unclear whether Medco retained the sums deducted from the total contribution for "service & organization" or "administration & billing," or both.

473 U.S. 134, 140 n.8 (1985) (citing 120 Cong. Rec. 29,932, 29,951, 29,954, 29,957, 29,961, 29,194, 29,196-97, 29,206 (1974)); *see also Acosta*, 950 F.2d at 620. These courts view the congressional imposition of a broad duty of loyalty upon fiduciaries of employee benefit plans as counselling "a more functional approach" to the question of whether a particular item constitutes an "asset of the plan." *Acosta*, 950 F.2d at 620. Under this approach, courts assess "whether the item in question may be used to the benefit (financial or otherwise) of the fiduciary at the expense of plan participants or beneficiaries." *Id.*

Taking this approach to the instant case, the Court finds that the item in question — employers' total contributions paid to Medco — was clearly used to benefit defendants. The total amount of the employers, contribution was set by defendants, and they retained that portion of the contribution not remitted to the Fund or Local 947. As plaintiff points out, the percentage of an employer's contribution retained by defendants was substantial; by way of example, plaintiff cites one case in which defendants retained an amount constituting more than 31% of the participating employer's monthly contribution. (Pl. Mem. at 15.) The detriment to plan participants and beneficiaries can also be established in this case, insofar as they paid higher premiums than were needed to provide benefits. (*Id.*) Defendants seek to deflect attention from this point by stressing that Medco remitted monies to the Funds in accordance with the coverage rate set by Local 947 and observing that the net assets of the Fund increased after Medco began serving as an ECBR. (Def. Mem. at 10.) But defendants' calculations fail to take

into account the extent to which they profited at the expense of plan participants and beneficiaries by exercising the discretion to set the total amount of participating employers' monthly contributions and then retaining the difference between that total and the amounts forwarded to the Fund and Local 947. In light of these considerations, the Court finds that, the monthly employers' contributions paid to Medco constitute "assets of the plan" when viewed from a functional perspective.

Because the Court finds that the amount of the employers' contributions paid to Medco constitute assets of the Fund and because defendants had set the total sum of the contribution employers had to pay (over and above the coverage rate set by the Fund and the union membership fee set by Local 947) to receive benefits through the Fund, the Court further concludes that defendants are fiduciaries within the meaning of ERISA; the record clearly indicates defendants had "discretionary authority or discretionary control . . . respecting management or disposition of [the Fund's] assets." 29 U.S.C. § 1002(21)(A).

C. *Liability of Defendants under ERISA*

Having determined that defendants are fiduciaries within the meaning of ERISA, the Court proceeds to consider plaintiff's claims that defendants, by extracting fees from contributions employers paid to obtain benefits through the Fund and diverting those assets of the Fund to their own use, (1) engaged in prohibited transactions under §§ 406(a)(1)(D) and 406(b)(1)(2) breached their fiduciary

duties under §§ 404(a)(1)(A) and 404(a)(1)(B) of ERISA; and (3) are liable as co-fiduciaries under § 405(a)(1).[13]

1. Prohibited Transactions: Sections 406(a)(1)(D) and 406(b)(1) of ERISA

Plaintiff claims that defendants Medco and Goldstein engaged in prohibited transactions under ERISA §§ 406(a)(1)(D)[14] and 406(b)(1)[15] by extracting fees from

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13. I note that defendants have not addressed the question of their liability under specific provisions of ERISA because they rest their entire argument on the premise that the service fee deducted by Medco from the employers' contribution paid to Medco is not a "plan asset" within the meaning of ERISA.

14. ERISA § 406(a)(1)(D) provides, in pertinent part:

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan . . . .

29 U.S.C. § 1106(a)(1)(D).

15. ERISA § 406(b)(1) provides, in pertinent part:

> (b) Transactions between plan and fiduciary
>
> A fiduciary with respect to a plan shall not . . . deal with the assets of the plan in his own interest or for his own account . . . .

29 U.S.C. § 1106(b)(1).

contributions employers paid to obtain health benefits from the Fund and diverting those Fund assets to their own use.

The *per se* prohibitions identified in § 406 of ERISA, 29 U.S.C. § 1106, are designed to prevent categories of "insider" transactions which Congress believed offered an especially high potential for abuse of plan assets. *Cutaiar v. Marshall*, 590 F.2d 523, 529 (3d Cir. 1979). Section 406(a) prohibits a fiduciary from causing the plan to enter into or maintain transactions with categories of "parties in interest," a term defined by § 3(14), 29 U.S.C. § 1002(14)[16] to include any fiduciary and any employer of employees covered by the plan or an officer or director of such employer. *Brock*, 8 Employee Benefits Cas. (BNA) at 2308. Section 406(b) prohibits a fiduciary from acting in conflict-of-interest situations, including dealing with plan assets in their own

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16. ERISA § 3(14) provides in relevant part:

> The term "party in interest" means, as to an employee benefit plan —
>
> (A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;
>
> (B) a person providing services to such plan;
>
> (C) an employer any of whose employees are covered by such plan. . . .

29 U.S.C. § 1002(14).

interest and acting on behalf of the plan in situations where they have an adverse interest or on behalf of another party whose interest is adverse. *Id.*

In order for a particular transaction to run afoul of § 406(a)(1)(D), it must involve (1) a transfer (2) to a party in interest (3) of plan assets. *Liss v. Smith*, 991 F. Supp. 278, 293 (S.D.N.Y. 1998). The parties in interest involved here are Medco and Goldstein. Medco is a party in interest because its employees receive benefit coverage through the Fund, 29 U.S.C. § 1002(14)(C), and Goldstein, because he is a person who provided services to the Fund, 29 U.S.C. § 1002(14)(B).[17] Having found that the total employers' contributions paid to Medco constitute assets of the Fund, the Court further finds that defendants, deduction of fees from this total amount paid by employers is a transaction proscribed by § 406(a)(1)(D) of ERISA.

With respect to § 406(b), the Court notes that the Second Circuit Court of Appeals has counseled in favor of broad construction of its provisions in order to protect beneficiaries and provide notice to fiduciaries of prohibited transactions. Such liability is imposed even where there is "no taint of scandal, no hint of self-dealing, no trace of bad faith." *Id.* (quoting *Cutaiar*, 590 F.2d at 528). In light of the Court's finding that the fees retained by defendants in their own interest or for their own account constituted assets of the Fund, defendants are further found to have acted in violation of § 406(b)(1) of ERISA.

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17. Goldstein served in this capacity from April 4, 1991 through March 1996. (Pl. St. ¶¶ 48-50.)

Appendix B

2. Breaches of Fiduciary Duty: Sections 404(a)(1)(A) and 404(a)(1)(B)

Section 404(a) of ERISA, 29 U.S.C. § 1104(a), sets forth the fiduciary's basic duties, which derive from traditional principles of the law of trusts. *Brock v. Ardito*, 8 Employee Benefits Cas. (BNA) 2303, 2307 (E.D.N.Y. 1987) The Second Circuit Court of Appeals has stated that sections 404(a)(1)(A) and 404(a)(1)(B)[18] "impose three different although overlapping standards":

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18. Sections 404(a)(1)(A) and 404(a)(1)(B) provide, in pertinent part:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. . . .

29 U.S.C. §§ 1104(a)(1)(A)-(B).

Appendix B

> A fiduciary must discharge his duties "solely in the interests of the participants and beneficiaries." He must do this "for the exclusive purpose" of providing benefits to them. And he must comply "with the care, skill, prudence, and diligence under the circumstances then prevailing" of the traditional "prudent man".

Donavan v. Bierwirth, 689 F.2d 263, 271 (2d Cir. 1982). Measuring the actions of the defendants in this case against the standards of care and prudence set forth by the Second Circuit, this Court finds that defendants have clearly violated their fiduciary duties under §§ 404(a)(1)(A) and 404(a)(1)(B) of ERISA. Defendants failed to take action with respect to the Fund "with an eye single to the interests of the participants and beneficiaries," *See Donovan v. Bierwirth*, 680 F.2d at 271, insofar as they acted in their own interest in setting the total amount of the contribution employers were required to make in order to obtain employee benefits through the Fund. Moreover, in calculating the total amount of the employers, contributions, defendants clearly did not act with the "exclusive purpose of defraying reasonable expenses of administering the plan," as required under the statute. 29 U.S.C. § 404(a)(1)(A).

The Court further finds that the summary judgment record supports the conclusion that defendants' actions also constitute a breach of defendants' fiduciary duty of prudence. Prudence is measured according to the objective "prudent person" standard developed in the common law of trusts. *Katsaros v. Cody*, 744 F.2d 270 (2d Cir. 1984) (quoting *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983));

see also United States v. Mason Tenders Dist. Council of Greater New York, 909 F. Supp. 882, 885 (S.D.N.Y. 1995). ERISA's prudence standard "is not that of a prudent lay person but rather that of a prudent fiduciary with experience dealing with a similar enterprise." *Id.* (quoting *Marshall v. Snyder*, 1 Employee Benefits Cas. (BNA) 1878, 1886 (E.D.N.Y. 1979)); *see also Donovan v. Mazzola*, 716 F.2d 1226, 1231-32 ("Courts have also recognized that in enacting ERISA Congress made more exacting the requirements of the common law of trusts relating to employee benefit trust funds."). The summary judgment record in this case adequately supports the conclusion that defendants failed to act as would prudent fiduciaries having experience dealing with a similar enterprise. The retention by defendants of Fund assets as fees, which the Court found above to constitute prohibited transactions under § 406 of ERISA, resulted in losses to the Fund for which defendants is liable under § 404(a)(1)(B). *See, e.g., Sandoval v. Simmon*, 622 F. Supp. 1174, 1215 & n.3 (D. Ill. 1985) (quoting Joint Explanatory Statement of the Committee of Conference, House Conference Report No. 1280, 93d Cong., 2d Sess.; citing *Herman v. Painting Industry Insurance Fund*, No. 77 Civ. 1490, slip op. at 3 (S.D.N.Y. 1981)).

3. Liability for breach of co-fiduciary: Section 405(a)

Finally, the Court considers plaintiff's claim that defendants are each liable under § 404(a)(1) of ERISA for the fiduciary violations of §§ 404(a)(1)(A), 404(a)(1)(B), 406(a)(1)(D) and 406(b)(1) of ERISA committed by the other, as co-fiduciaries. Section 404(a)(1) of ERISA renders a fiduciary vulnerable to liability for breaches committed

by other fiduciaries "if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or a duty to the plan, (2) that the fiduciary knowingly participated in the breach or undertook to conceal it, and (3) damages resulting from the breach. *See Diduck v. Kaszycki & Sons Contractors*, 974 F.2d 270, 281-82 (2d Cir. 1992); *see also Silverman v. Mutual Benefit Life Ins. Co.*, 941 F. Supp. 1327 (E.D.N.Y. 1996). While plaintiff's briefing of this point is relegated to a footnote, (*see* Pl. Mem. at 32 n.8), the Court finds that the summary judgment record provides a sufficient basis for establishing defendants' liability under § 405(a)(1). As has been concluded above, both Medco and Goldstein breached a duty to the Fund and each acted with the knowledge of the other's activities. Moreover, insofar as defendants' breach consisted of deducting Fund assets from employers, contributions as their fee, there was clearly damage to the Fund. Accordingly, the Court grants summary judgment to plaintiff as to their claims against defendants under § 405(a).

D. *Remedies*

To remedy defendants, violations of ERISA, plaintiff seeks injunctive and other equitable relief in the form of an order of the Court: (1) correcting the prohibited transactions; (2) restorating to the Fund of all losses incurred as a result of the fiduciary breaches they committed, plus interest (including prejudgment interest); and (3) enjoining defendants from violating ERISA and from ever serving as fiduciaries or service providers of fiduciary breaches they committed, plus interest (including prejudgment interest); and (3) enjoining defendants from violating ERISA and from

ever serving as fiduciaries or service providers of any employee benefit plan, pursuant to § 409(a) of ERISA, 29 U.S.C. § 1109.

Section § 409(a) provides, in pertinent part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate.

29 U.S.C. § 1109(a). Under the circumstances of this case, the Court finds that the relief requested by plaintiff is reasonable in all respects. However the Court finds that an inquest is required to determine the damages assessable against Medco and Goldstein. According, this action is hereby referred by Magistrate Judge Ellis for this purpose. The parties are directed to contact Magistrate Judge Ellis' Chambers by August 31, 1998 to schedule further proceedings in this matter.

V. *Conclusion*

For the reasons stated above, plaintiff's motion for summary judgment is granted in its entirety and defendants'

motion for summary judgment is denied in its entirety. This matter is hereby referred to Magistrate Judge Ellis for an inquest to determine the damages assessable against Medco and Goldstein. The parties are directed to contact Magistrate Judge Ellis' Chambers by August 31, 1998 to schedule further proceedings in this action.

SO ORDERED.

DATED: New York, New York
August 10, 1998

s/ Kimba M. Wood
Kimba M. Wood
United States District Judge

APPENDIX C — FINAL JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED OCTOBER 22, 1999 AND FILED OCTOBER 26, 1999

HONORABLE KIMBA M. WOOD
Civil Action File No. 95-CIV-7247

Mark A. Holbert
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New York, New York 10014
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MH (3940)

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 95 CIV 7247 (KMW)

ALEXIS M. HERMAN, Secretary of Labor,
United States Department of Labor,

Plaintiff,

v.

SOLIDARITY OF LABOR ORGANIZATIONS HEALTH AND WELFARE FUND; EDMUNDO PEREZ; PEDRO LOPEZ; WILLIAM FAGELLO; PHILIP VERO; ARTHUR GOLDSTEIN; SOLIDARITY OF LABOR ORGANIZATIONS, LOCAL UNION 947; ASSOCIATE MEMBERS ADMINISTRATIVE SERVICES, INC.; and MEDCO ADMINISTRATORS, LTD.,

Defendants.

Appendix C

FINAL JUDGMENT AND ORDER

This matter having come before this Court on cross motions by Plaintiff Alexis M. Herman ("the Secretary") and Defendants Arthur Goldstein and MEDCO Administrators, Ltd. for summary judgment, and this Court, on August 10, 1998, having issued an Opinion and Order granting the Secretary's motion and having denied the Defendants' motion, and this Court finding the relief sought by the Secretary to be reasonable in all respects, and this Court having referred for inquest the determination of damages, and this Court, on July 16, 1999, having entered an Order adopting, in its entirety, the June 9, 1999 Report and Recommendation issued as a result of such inquest, and finding Defendants Arthur Goldstein and MEDCO Administrators, Ltd. jointly and severally liable for losses suffered by the Solidarity of Labor Organizations Health and Welfare Fund, and consent judgments having been entered with respect to all other defendants to this action,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Judgment is entered against Defendants Arthur Goldstein and MEDCO Administrators, Ltd. jointly and severally in the amount of $9,525,493.16, plus $2,112.55 interest for each date after June 9, 1999, as restitution to the Solidarity of Labor Organizations Health and Welfare Fund, and as correction of all prohibited transactions. Such restitution shall be made by Defendants Arthur Goldstein and MEDCO Administrators, Ltd. to the Solidarity of Labor Organizations Health and Welfare Fund, which was named

as a defendant, pursuant to Rule 19(a) of the Federal Rules of Civil Procedure, solely to assure that complete relief could be granted. Defendants Arthur Goldstein and MEDCO Administrators, Ltd. shall provide notice to the Secretary of all restitution made pursuant to this Judgment and Order by sending written notice of all payments to the Pension and Welfare Benefits Administration, U.S. Department of Labor, U. S. Customhouse, 6 World Trade Center, Room 625, New York, New York 10048, within five (5) days of deposit.

2. Defendants Arthur Goldstein and MEDCO Administrators, Ltd. are permanently enjoined from committing or knowingly participating in any future violations of Title I of the Employee Retirement Income Security Act, as amended 29 U.S.C 1001, *et seq.* ("ERISA").

3. Defendants Arthur Goldstein and MEDCO Administrators, Ltd., and any corporate successor to MEDCO Administrators, Ltd., are permanently enjoined individually and collectively from directly or indirectly, or through any agent, entity or individual, from serving as fiduciaries or services providers to the Solidarity of Labor Organizations Health and Welfare Fund, and for any other employee benefit plan covered by ERISA, including engaging in any of the following conduct:

> (a) Providing or rendering to any employee benefit plan services of any kind, including but not limited to, consulting, advising, providing brokerage services, representing, making recommendations, bringing any investment to the attention of any employee benefit plan, accounting, or bookkeeping;

(b) Selling, leasing, or otherwise transferring for consideration any interest in any property to any employee benefit plan;

(c) Receiving any compensation, consideration, or anything of value from any employee benefit plan, except a benefit received as a participant of a plan to which defendant has a lawful entitlement, and then only in the amount and in the same circumstances as would any other similarly situated participant;

(d) Soliciting on behalf of himself or others, any person defendant knows or has reason to know is an administrator, fiduciary, officer, trustee, custodian, counsel, agent, employee, adviser, provider of goods or services, consultant, or representative in any capacity of any employee benefit plan, concerning the employee benefit plan's acquisition or use of goods, services, investments, or other property, or relating in any way to the disposition or use of plan assets;

(e) Serving as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, employee, adviser, provider of goods or services, consultant, or representative in any capacity, or serving in any capacity that involves decision making authority or custody or control of the monies, funds or assets, of any employee benefit plan; or

(f) Making any recommendation to, providing any advice to, bringing any investment to the attention of, or in any way facilitating or encouraging any investment by, any person or entity where defendant knows or has reason to know that person or entity or any other person or entity may use any such information, advice, or recommendations in connection with transactions involving employee benefit plans.

5. Costs are awarded to the Plaintiff.

6. This Court shall retain jurisdiction of this matter for purposes of enforcing the terms of this Final Judgment and Order.

The Clerk of Court is directed to close this case.

DATED: New York, New York
October 22, 1999

s/ Kimba M. Wood
KIMBA M. WOOD
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 22, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22nd day of December two thousand.

Dkt No: 99-6364

Herman

v

Goldstein

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Arthur Goldstein & Medco Administrators

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

Appendix D

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

APPENDIX E — RELEVANT STATUTES

29 U.S.C. § 1004

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as

such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

(1) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) —

(A) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(B) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of —

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

Appendix E

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement —

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement —

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection —

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

29 U.S.C. § 1105

§ 1105. Liability for breach of co-fiduciary

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(b) Assets held by two or more trustees

(1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees —

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which

event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) of this section or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons

other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that —

(A) the named fiduciary violated section 1104(a)(1) of this title —

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided

in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

(d) Investment managers

(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

29 U.S.C. § 1106

§ 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not —

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

Supreme Court, U.S.
FILED
MAY 23 2001
OFFICE OF THE CLERK

(2)

No. 00-1473

In the Supreme Court of the United States

ARTHUR GOLDSTEIN AND MEDCO ADMINISTRATORS, LTD., PETITIONERS

v.

ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether petitioners exercised control or authority over "plan assets," and were thereby fiduciaries under the Employee Retirement Income Security Act of 1974 (ERISA), when they set "service fees" for themselves and deducted those fees from contributions that employers were required to make to an ERISA benefit plan.

2. Whether petitioners' liability under ERISA was properly determined on cross-motions for summary judgment.

3. Whether ERISA authorizes the permanent injunction granted to the Secretary of Labor against petitioner Goldstein in the circumstances of this case.

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In the Supreme Court of the United States

No. 00-1473

ARTHUR GOLDSTEIN AND MEDCO ADMINISTRATORS, LTD., PETITIONERS

v.

ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 224 F.3d 128. The opinion and order of the district court (Pet. App. 3a-29a) is unreported. The final judgment and order of the district court (Pet. App. 30a-34a) is unreported.

JURISDICTION

The court of appeals entered its judgment on September 7, 2000. A petition for rehearing was denied on December 22, 2000 (Pet. App. 35a-36a). The petition for a writ of certiorari was filed on March 22, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Employee Retirement Income Security Act of 1974 (ERISA), a fiduciary must act solely in the interests of plan participants and beneficiaries, for the exclusive purpose of providing benefits to them and defraying reasonable expenses of administering the plan, and with a high degree of prudence. 29 U.S.C. 1104(a)(1)(A), (B). A fiduciary must also avoid certain prohibited transactions between the plan and parties in interest and may not deal with plan assets in his own interest or for his own account. 29 U.S.C. 1106(a), (b)(1). A fiduciary who violates ERISA not only must repay plan losses and disgorge profits made through the use of plan assets, but also is "subject to such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. 1109(a).

One of the ways that a person may become a fiduciary with respect to an employee benefit plan is by "exercis[ing] any authority or control respecting management or disposition of [plan] assets." 29 U.S.C. 1002(21)(A)(i). ERISA does not explicitly define the types of property that will be regarded as plan assets. The Department of Labor, which has authority to issue regulations defining ERISA terms, 29 U.S.C. 1135, has decided not to promulgate a comprehensive definition of "plan assets." 50 Fed. Reg. 961, 962 (1985) (withdrawing proposed regulation). The Department reasoned that in most cases, plan assets can be identified "based on ordinary notions of property rights under non-ERISA law and the terms of any contract to which

the plan is a party." *Ibid.*[1]

2. The Solidarity of Labor Organizations Health and Welfare Fund (SOLO) is an employee health benefits plan established by Local 947 of the SOLO Union and certain employers. Pet. App. 4a-5a. Under the plan's trust agreement, participating employers make contributions to a trust fund in the amounts set forth in their agreements with Local 947. See *id.* at 16a (discussing definitions of "Trust Fund" and "contributions to the Trust"). Expenses incurred in administering and operating the plan and Trust Agreement are to be paid out of assets of the Trust Fund. *Id.* at 16a n.9.

In 1989, the trustees of the SOLO Fund instituted an "associate membership program" to obtain more employers to participate in the Fund. Pet. App. 5a. They did so, in part, through contracts with so-called "employer collective bargaining representatives" (ECBRs), who could not bargain over anything except plan-related matters. *Id.* at 5a-6a. Those contracts authorized the ECBRs to negotiate "Associate Membership Agreement[s]" on behalf of employers with Local 947. *Id.* at 6a. Petitioner Medco Administrative Services (Medco) functioned as an ECBR and also enrolled itself in the plan. *Id.* at 7a-8a. Petitioner Goldstein is the former President of Medco. *Id.* at 7a n.5.

In soliciting employers for the Fund, Medco would first require an interested employer to execute a document entitled "Authorization of Collective Bargaining Representative," which named Medco as the employer's collective bargaining representative. Pet. App. 8a.

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[1] The Department has defined "plan assets," however, with respect to plan investments and participant contributions to a plan. 29 C.F.R. 2510.3-101, 2510.3-102. Those regulations do not govern this case, which involves *employer* contributions.

Medco then obtained information concerning the health of the employer's employees, which was forwarded to the Fund. *Ibid.* If the employer met the Fund's criteria, Medco then entered into an Associate Membership Agreement with the employer and Local 947. *Ibid.* Under the membership agreement, the employer agreed to be bound by the terms of the SOLO Fund's Trust Agreement. *Ibid.*

Although the Trust Agreement required employers to contribute to the Fund, Medco's membership agreements directed employers to pay their monthly contributions to Medco. Pet. App. 9a. Medco billed employers for a contribution amount that included not only a contribution to the Fund but also membership fees of employees for Local 947 and a "service fee" for Medco. *Ibid.* Goldstein and Medco determined the amount of this "service fee," but Medco's bills to employers did not specify how much of the employer's monthly contribution would be forwarded to the Fund and how much would be kept by Medco. *Id.* at 9a, 17a-18a & n.12. Medco's "service fees" were sometimes more than 31% of an employer's monthly contribution. *Id.* at 19a. From March 1991 through February 28, 1997, petitioners deducted a total of $6,631,806 in service fees from employer contributions. C.A. App. 1729-1730 (Magistrate's Report and Recommendation).

3. In 1995, the Secretary sued petitioners and other defendants for ERISA violations in connection with the SOLO Fund. Pet. App. 4a. All defendants except petitioners agreed to consent judgments. *Ibid.* The Secretary and petitioners then filed cross-motions for summary judgment. *Id.* at 4a-5a.

The district court granted summary judgment to the Secretary and denied petitioners' motion for summary judgment. Pet. App. 4a, 28a-29a. The court reasoned

that petitioners were fiduciaries as defined in ERISA. *Id.* at 13a-20a; see 29 U.S.C. 1002(21)(A)(i) (fiduciary includes a person who exercises authority or control over the management or disposition of plan assets). The court concluded that contributions petitioners received from employers were plan assets under a "documentary approach," which relies on documents governing the relationship between the Fund and employers. The court noted that those documents gave the plan the right to receive all contribution amounts from a contributing employer. Pet. App. 15a-18a. The court also concluded that the contributions were plan assets under a "functional approach," which considers whether the item in question may be used to benefit a fiduciary at the expense of plan participants or beneficiaries. *Id.* at 15a, 18a-20a. The court held that petitioners were fiduciaries with respect to the plan assets in question (the employer contributions sent to Medco), because petitioners exercised control or authority over the employer contributions by setting the total amount of contributions an employer had to pay. *Id.* at 20a.

Having determined that petitioners were fiduciaries, the district court then held that petitioners engaged in prohibited transactions, in violation of 29 U.S.C. 1106(a)(1)(D) and (b)(1), by transferring plan assets to themselves, despite their status as parties in interest to the SOLO plan, and by dealing with plan assets for their own interest or account. Pet. App. 21a-23a. The court further held that petitioners violated 29 U.S.C. 1104(a)(1)(A) and (B) by failing to act prudently or solely in the interest of the plan in setting the total amount of employer contributions. Pet. App. 24a-26a.

As a remedy, the district court permanently enjoined petitioners from violating ERISA and from ever serving as fiduciaries or service providers to any ERISA

plan. Pet. App. 27a-28a, 32a-34a. The court also required petitioners to repay to the plan the service fees that petitioners had deducted from employer contributions. *Id.* at 28a. With prejudgment interest, that amounted to $9,525,493.16. *Id.* at 31a; see C.A. App. 1734-1735 (calculations in Magistrate's Report and Recommendation).

4. The court of appeals affirmed in a brief, per curiam opinion. Pet. App. 1a-2a. The court concluded that the fees petitioners withheld from employer contributions were plan assets "substantially for the reasons stated in [the district court's opinion], analyzing the terms of the documents governing the Fund." *Id.* at 2a. The court rejected petitioners' arguments that they were not fiduciaries, found "no error in the district court's determination that defendants' conduct violated ERISA," and found petitioners' other arguments to be "without merit." *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners argue that the court of appeals applied an ambiguous "governing documents" standard that leads to "arbitrary and inconsistent holdings" in determining that Medco's fees were plan assets. Pet. 10. Petitioners further argue that the court of appeals rejected a standard urged by the Department of Labor, which combines a "governing documents" and a "functional or economic realities" approach. Pet. 8, 11. Neither of petitioners' assertions is accurate.

As discussed above, the Department of Labor has determined that in most cases plan assets can be

identified "based on ordinary notions of property rights under non-ERISA law and the terms of any contract to which the plan is a party." 50 Fed. Reg. at 962. The Department has thus accepted a "governing documents" approach that looks to the plan's rights under contracts to which the plan is a party. The Department advocated that approach in the court of appeals and did not suggest that a "functional" or "economic realities" approach should also be used in determining whether employer contributions are plan assets. See Gov't C.A. Br. 12-17.[2] A "functional" approach is appropriately employed, after plan assets are identified, for purposes of determining whether a defendant exercises the kind of control or authority over such assets that makes the defendant a fiduciary. See 29 U.S.C. 1002(21)(A)(i) (generally defining "fiduciary" in terms of functions performed, such as "exercis[ing] any authority or control respecting management or disposition of [plan] assets"); Gov't C.A. Br. 11, 17-20.

The primary governing document in this case is the plan's trust agreement, to which contributing employers agreed to be bound through Associate Membership Agreements. Pet. App. 8a; see also *id.* at 17a-18a & n.11 (discussing summary plan description). The trust agreement provides that participating employers will make contributions to the plan's trust fund, in amounts to which employers and Local 947 have agreed, and that expenses will be paid out of trust fund assets. *Id.* at 16a & n.9. Therefore, the plan had a right

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[2] The Department informed the district court that courts have applied both a "functional" and a "governing documents" test, see Mem. of Law in Support of Plaintiff's Mot. for Summary Judgment Against Medco Administrators, Ltd. and Arthur Goldstein 14-22, but did not expressly endorse the functional one.

to receive all contributions that employers agreed to make, including the part that petitioners designated as a "service fee" for themselves. See *id.* at 17a. The plan was also responsible for paying expenses incurred by ECBRs in obtaining new business for the plan. Petitioners had no right to compensate themselves for claimed expenses by deducting from employers' contributions a "service fee" in an amount set by petitioners and not disclosed to the employers.

Petitioners attempt to avoid those facts by arguing that they had rights to a service fee under "[t]he Authorization of Collective Bargaining Representative, entered into between Medco and its employer clients." Pet. 11. Because that document is not a "contract to which *the plan is a party*," 50 Fed. Reg. at 962 (emphasis added), it does not alter the plan's rights as set out in the plan's trust agreement. The fact that Medco entered into those contracts with employers shows only that petitioners were attempting to circumvent the trust fund documents by giving themselves authority to do what the trust fund documents prohibited.

Petitioners also argue that the court of appeals misconstrued the Associate Membership Agreements, which, as discussed above, required employers to follow the terms of the plan's trust agreement. See Pet. 13-16 (discussing so-called "collective bargaining agreement[s]" that employers, through petitioners, entered into with Local 947). In petitioners' view, the Associate Membership Agreements establish that employers intended to pay petitioners a service fee that was separate from the contributions that the employers agreed to pay to the trust fund. *Ibid.* Petitioners, however, did not tell employers the *amount* they were being charged as a service fee or separate that amount

from the amount that employers sent to petitioners as a plan contribution. Pet. App. 17a-18a & n.12. Accordingly, petitioners' service fee cannot be separated from the contributions that employers agreed to make to the plan.

2. Petitioners also argue that the court of appeals should have applied a "functional" or "economic realities" test to determine whether its service fees were plan assets, and that the court's failure to do so creates a conflict with *Kayes* v. *Pacific Lumber Co.*, 51 F.3d 1449, 1467 (9th Cir.), cert. denied, 516 U.S. 914 (1995).[3] Pet. 17-21. Neither argument is persuasive.

The court of appeals in this case did not necessarily "ignore[]" consideration of a functional approach, as petitioners assert. Pet. 17. The court affirmed a district court decision that had concluded that petitioners' service fees were plan assets under both a documentary approach and a functional approach. See Pet. App. 14a-20a (district court's decision). Although the court of appeals stated that its affirmance was "substantially" for the district court's reasons "analyzing the terms of the documents governing the Fund," the court cited to pages in the district court's decision that

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[3] Petitioners also incorrectly argue (Pet. 20) that the court of appeals' decision is inconsistent with the court's own decision in *Trustees of the National Automatic Sprinkler Industry Pension Fund* v. *Fairfield County Sprinkler Co.*, 243 F.3d 112 (2d Cir. 2001). *Sprinkler Industry* holds that a collectively bargained pension plan may not accept contributions when there is no written agreement requiring the contributions to be made and the contributions are for employees who are not covered by the plan. *Id.* at 116-118. In this case, there was such a written agreement and the contributions were for employees covered by the SOLO plan. In any event, review by this Court would not be warranted to resolve an intra-circuit conflict.

both analyzed those documents and applied a functional approach. *Id.* at 2a (citing *Metzler* v. *Solidarity of Labor Organizations Health & Welfare Fund*, No. 95 Civ. 7247 (KMW), 1998 WL 477964, at *5-*7 (S.D.N.Y. 1998)); see Pet. App. 13a-20a. Thus, the court's decision may be read to rely "substantially" on a documentary approach but also to consider the functional approach. At the very least, it cannot be said that the court of appeals' brief per curiam opinion firmly commits the Second Circuit to applying only a "governing documents" approach—without consideration of "functional" factors—in the future.

In any event, use of the Ninth Circuit's approach would not change the result in this case. The district court applied that test and concluded that the employers' contributions were "clearly used to benefit [petitioners]" because they set the total amount of such contributions and retained part of that amount for themselves. Pet. App. 19a. Petitioners' actions also harmed plan participants and beneficiaries by leading to higher premiums than were needed to provide benefits. *Ibid.* Petitioners present no reasons to second-guess the district court's determination. Indeed, they themselves urged the court of appeals to reject the Ninth Circuit's test, as applied by the district court, because they would be unable to prevail under it. Pet. C.A. Br. 42-43.[4]

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[4] Petitioners also attempt to expand the Ninth Circuit's functional test into one that looks at the "economic relationship among the employers, Medco, Local 947 and the Fund." Pet. 18. Petitioners then describe that relationship as one in which the employers, Local 947, and the Fund all understood and agreed that Medco's fees were not plan assets. Pet. 18-21. For reasons discussed in text, there was no such agreement or understanding. Nor are petitioners accurate in suggesting that, under the court

3. Petitioners also argue that the court of appeals misapplied statutory and regulatory definitions of a "fiduciary" in concluding that petitioner Goldstein was a fiduciary in all instances in which petitioner Medco set fees. Pet. 21-24. In particular, they argue that because a person is a fiduciary only "to the extent" that he exercises prescribed authority, see 29 U.S.C. 1002(21)(A); 29 C.F.R. 2509.75-8, FR-16, Goldstein is a fiduciary only to the extent that he personally set Medco's fees in each and every instance in which Medco collected a fee. Pet. 22. Petitioners then argue that Goldstein's admission that he set fees for Medco is ambiguous as to when he set them. Pet. 23-24.

There is no ambiguity as to Goldstein's admission or uncertainty as to his liability as a fiduciary. Goldstein was the President of Medco from its inception until March 1996. Pet. App. 7a n.5. His admission that he set fees "at that time," see Pet. 23, is most naturally read as an admission that he set fees during the time he was

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of appeals' decision, "plan assets" could include a fee that an employer pays to its attorney for settling a claim for contributions brought by an ERISA plan. Pet. 21. ERISA permits a contributing employer to pay its attorneys for services rendered to the employer. ERISA also permits a plan to pay service providers, including attorneys, a reasonable fee for their services to the plan. See 29 U.S.C. 1108(b)(2). ERISA does not permit an attorney to do what petitioners did here: solicit employers for the plan, then represent the employers, and then engage in self-dealing by deducting fees from the employers' contributions to the plan without disclosing the amount of those fees to either the plan or the employers. See also *In re Consolidated Welfare Fund ERISA Litig.*, 839 F. Supp. 1068, 1073 (S.D.N.Y. 1993) (defendant's "scheme of funnelling employer contributions to the Fund through his wholly owned companies and deducting 'commissions' before those contributions were paid to the Fund, violates the very essence of trust law").

President. Petitioners present nothing to suggest that anyone else set fees or had the authority to do so during that period. Moreover, Goldstein would be liable even if he did not personally set fees in each and every case, because he knew of Medco's breaches and either enabled Medco to commit them or failed to remedy them. See 29 U.S.C. 1105(a)(2), (3); 29 C.F.R. 2509.75-8, FR 16; Pet. App. 26a-27a. Goldstein also retained indirect control over Medco after March 1996. See Pet. App. 7a n.5 (present President of Medco is Goldstein's brother, and the only shareholders of Medco are Goldstein's spouse and sister-in-law). Further review of petitioners' factbound contentions concerning Goldstein's status as a fiduciary with respect to each of Medco's fees is therefore not warranted.

4. Finally, petitioners argue that the grant of a permanent injunction against petitioner Goldstein, prohibiting him from serving as a fiduciary or service provider to an ERISA plan, deviates so far from the remedies allowed under ERISA as to call for an exercise of this Court's supervisory power. Pet. 26-27.[5] Petitioners do not dispute that a permanent injunction is available under ERISA. Instead, they argue that such an injunction is available only when a defendant's conduct is "egregious," and that Goldstein's conduct did not satisfy that standard. *Ibid.*[6]

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[5] Petitioners also argue (Pet. 25-26) that the court of appeals deviated from summary judgment standards. Petitioners' argument is simply a renewal of their meritless attempt to establish rights to their service fees under the Authorization of Collective Bargaining Representative document and Associate Membership Agreements.

[6] Petitioners complain that the injunction should not have been issued without a hearing because material facts were in dispute. Pet. 26-27. For reasons discussed in text, material facts con-

Neither of petitioners' arguments is accurate. The courts of appeals have recognized that an individual may be permanently enjoined from acting as a fiduciary or service provider because of ERISA violations that are "significant," *Reich* v. *Lancaster*, 55 F.3d 1034, 1054 (5th Cir. 1995), or "serious," *Beck* v. *Levering*, 947 F.2d 639, 641 (2d Cir. 1991), cert. denied, 504 U.S. 909 (1992). See also *Martin* v. *Feilen*, 965 F.2d 660, 673 (8th Cir. 1992) (abuse of discretion not to enjoin defendant who engaged in "actionable self-dealing" and "displayed an appalling insensitivity" to ERISA requirements), cert. denied, 506 U.S. 1054 (1993). Petitioner Goldstein committed serious and significant violations of ERISA, depriving a health care plan of $9,525,493.16 through a pattern of self dealing that continued even after the Secretary sued to stop them. Goldstein's violations would also meet an "egregious" standard because they were intentional and demonstrate a continuing insensitivity to ERISA's requirements. Accordingly, a permanent injunction was appropriate.[7]

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cerning petitioner Goldstein's conduct were not in dispute. Granting an injunction at the summary judgment stage was therefore appropriate. See 10B Charles Alan Wright et al., *Federal Practice and Procedure* § 2731, at 94-95 (3d ed. 1998).

[7] Petitioners inaccurately assert (Pet. 27) that the Department's consent judgments with other defendants do not provide for the kind of permanent injunction that the Department obtained against petitioner Goldstein. The two defendants who, like petitioners, solicited employers for participation in the Fund (Philip Vero and Associated Members Administrative Services, Inc.) consented to such an injunction. C.A. App. 1641, 1645-1646. The other defendants, including the Fund's trustees, were not shown to have engaged in self-dealing comparable to that of petitioners. They were not enjoined from serving as fiduciaries or service providers, but they were enjoined from future ERISA violations and from entering into agreements that would result in the Fund

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2001

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or an employer paying money to entities, including petitioner Medco, unless such payments complied with ERISA. C.A. App. 1631, 1635-1636.

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IN THE

Supreme Court of the United States

ARTHUR GOLDSTEIN and
MEDCO ADMINISTRATORS, LTD.,

Petitioners,

v.

ELAINE L. CHAO, Secretary of Labor,
United States Department of Labor,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner Medco states that there is no parent or publicly held company that owns 10% or more of the corporation's stock.

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STATEMENT

The Acting Solicitor General ("Government") filed a brief ("Opposition Brief") on behalf of respondent, Elaine L. Chao, Secretary of Labor, United States Department of Labor ("DOL"), in opposition to petitioners' Arthur Goldstein's ("Goldstein") and Medco Administrators, Ltd.'s ("Medco") Petition for a Writ of Certiorari (referred to collectively as the "petitioners"). This brief is submitted in reply to the Government's brief.

A. The Government's Opposition Brief Supports Petitioners' Argument That The Supreme Court Needs to Grant Certiorari In Order To Establish The Standard to Apply In Determining What Constitutes Plan Assets.

The fundamental issue in this case is whether the fees paid to Medco by employers in consideration for services provided by Medco to the employers constituted assets of the SOLO Benefit Fund (the "Fund"). In their Petition for a Writ of Certiorari, petitioners contend that there is no consistent or logical standard for determining whether fees paid to employer representatives, such as Medco, constitute plan assets. This argument has two components. First, the standard applied by the Second Circuit in answering this question focused solely upon the "governing documents" and clearly conflicted with the "functional" approach adopted by the Ninth Circuit. Second, the "governing documents" standard utilized by the Second Circuit in this case is so nebulous that it provides no standard at all.

The petitioners contend that the appropriate standard that should be adopted is one in which courts examine both the relevant documents that create the trust fund and which define the parties' relationship as well as the economic and practical realities of the parties' relationship. This approach is similar to the standard adopted by the Ninth Circuit. *See Acosta v. Pacific Enterprises*, 950 F.2d 611 (9th Cir. 1991); *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449 (9th Cir. 1995).

The Second Circuit, in rejecting the approach urged by petitioners, instead relied solely upon a consideration of the

documents that govern the Fund in determining whether Medco's fees are plan assets.[1] In its Opposition Brief, the Government argues that the standard employed by the Second Circuit is correct. The standard applied by the Second Circuit, and urged by the Government, however, is flawed in several important respects.

1. The Government's Position That The Governing Documents Test Is The Appropriate Standard, And That A Functional or Economic Realities Test Should Be Rejected, Is Inconsistent With Its Previous Positions In This Case.

The Government states in its Opposition Brief that the DOL has "accepted" a governing documents test and that it has advocated this position throughout this case Gov't Opp. Brief 7.[2] The Government further states that it "did not suggest that a 'functional' or 'economic realities' approach be used in determining whether employer contributions were plan assets." *Id.* This is, quite simply, not true.

The DOL included in its memorandum of law in support of its motion for summary judgment before the District Court a section titled "a. The functional or economic realities analysis." In its introduction to this section, the DOL wrote that "[I]n determining whether or not a particular item constitutes a plan asset, the Courts have generally utilized two approaches: (1) a functional or economic realities analysis; and, (2) an examination of the governing documents." The DOL then urged the District Court to adopt the functional or economic realities approach utilized by the District Court in *Reich v. Polera*

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1. In affirming the District Court's finding that the fees paid to Medco are plan assets, the Second Circuit relied "substantially for the same reasons stated in Judge Wood's Opinion and Order . . . analyzing the terms of the documents governing the Fund" *Herman v. Goldstein, et al.*, 224 F.3d 128, 129 (2d Cir. 2000) *See also* Petition for Writ of Certiorari, at App. A).

2. "Gov't Opp. Br. __" followed by a number refers to the page number in the Government's brief in opposition to the Petition for Certiorari.

Building Corp., 20 EBC 1100 (S.D.N.Y 1996) in which a question similar to the one at bar was presented. The DOL further extolled at length the merits of the functional or economic realities analysis as applied by the Ninth Circuit in *Acosta* and *Kayes*. The DOL next applied this functional or economic realities analysis to the facts of the instant case and urged the District Court to adopt this approach.

For the Government to suggest, as it now does, that in doing the foregoing it simply "informed" the District Court of the existence of the functional test, but "did not expressly endorse the functional one" is both an attempt to hide from the facts of this case and to mask the fact that there exists no clearly defined and consistent standard to apply in determining whether particular monies constitute plan assets (See Gov't Opp. Brief at fn. 2).

The inconsistent positions taken by the DOL and the Government serves to highlight the need for the Supreme Court to resolve the conflict among the Courts as to the test to be used to determine what constitutes plan assets.

2. The Governing Documents Test, As Applied By The Second Circuit, Is In Fact No Standard, And Is Fundamentally Flawed, As It Does Not Address Which Documents Are To Be Considered Or What Weight Is To Be Given Any Particular Document.

The Government's argument, that the governing documents test as applied by the Second Circuit was correct, is flawed for several reasons. The primary difficulty with the governing documents test is that it fails to establish any guidelines or instruction as to which documents are to be considered and which are to be ignored as well as the relative weight to be given the documents considered. As a result, certain documents may be considered as relevant by one court while another court may chose to ignore the same document, or may accord the document vastly different importance. This invariably leads, as it did in the instant case, to an arbitrary and inconsistent application of the test.

For example, the District Court, and thus presumably the Second Circuit, ignored many important aspects of the collective bargaining agreements entered into between the Solidarity of Labor Organizations (the "Union" or "Local 947") and Medco's employer clients. The District Court, and thus presumably the Second Circuit, further completely ignored other significant documents, such as the Authorization of Collective Bargaining, the document that served as the retainer between Medco and its employer clients. As discussed in Petitioners' Petition for Writ of Certiorari, these documents lend great support to petitioners' argument that Medco's fees are not plan assets.

The failure of the Second Circuit to consider all aspects of the collective bargaining agreements, and to instead rely upon only a few select passages, is without justification. Edmund Perez ("Perez") was both the President of Local 947, the labor organization that entered into the collective bargaining agreements with Medco's employer clients, as well as a trustee of the Fund. Accordingly, Perez was familiar with the terms of the collective bargaining agreements. By accepting contributions pursuant to these collective bargaining agreements, the Fund impliedly, if not expressly, ratified and agreed to the terms of the collective bargaining agreements as they related to the Fund. Thus, the collective bargaining agreements must be read, in their entirety, *in pari materia* with the trust indenture, which they were not.

Another example of how the governing documents test leads to the exclusion of relevant evidence as to whether Medco's fees are plan assets is that the Government argues that the Authorization of Collective Bargaining Representative should be disregarded. The Government contends that since this document "is not a 'contract to which *the plan is a party* [citations omitted]', it does not alter the plan's rights as set forth in the plan's trust agreement." Gov't Opp. Brief 8. The Government's position, which it takes for the first time, that no document can be considered unless the plan is a party to that document, is inconsistent with its position in this case, court

decisions and various statutes. Under this approach, even the very document that establishes the plan's right to contribution, the collective bargaining agreement, would not be considered because the plan is not a signatory to the collective bargaining agreement. Excluding the collective bargaining agreement, however, would contradict the Supreme Court's holding in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985) that the collective bargaining agreement is a relevant document that must be examined in order to determine the Fund's rights under ERISA. By arbitrarily considering some documents "governing documents" and others not "governing documents," the Government advocates a test which is arbitrary and, thus, inherently flawed.

Further, the approach adopted by the Second Circuit and advocated by the Government ignores the fact that Medco was the employers' collective bargaining representative. Perhaps the Government disregards the Authorization of Collective Bargaining Representative because this document establishes that Medco was the employer's representative, that Medco acted on behalf of the employers and that it was entitled to fees for its services for the employers. Moreover, while the Government may *argue* that the employers agreed that the monies paid to Medco were intended by the employers to plan assets, there is not a scintilla of evidence that the employers intended that these payments constituted plan assets or were considered as such by the employers. In fact, the contrary is the case. The record is clear that the employers did not intend that their payments to Medco be considered plan assets. The Government can only make this argument because it ignores the Authorization of Collective Bargaining Representative which establishes Medco's entitlement to its fees.

3. The Mechanical Application Of The Governing Documents Test, Looking Only Primarily At The Trust Indenture For Guidance, Leads To Both An Illogical And Unlawful Result.

The mechanical application of the governing documents test, looking only at the trust indenture for guidance, leads to both an illogical and unlawful result. Under the reasoning adopted by the Second Circuit, all sums sent by employers to Medco are plan assets. However, included among these amounts, in addition to contributions required by the Fund and Medco's fees, were Union dues checked-off from employees' wages to be remitted to the Union. According to the analysis adopted by the Second Circuit, the union dues, sent by employers to Medco and forwarded from Medco to Local 947, are plan assets. Thus, the Local 947 officials or even payroll clerks that accepted the union dues and deposited these amounts into Local 947's account are no less Fund fiduciaries than Medco and Arthur Goldstein by virtue of the fact they exercised discretionary control over plan assets in depositing the union dues into the union's accounts.

It also would have been illegal for Medco to remit to the Fund Local 947 union dues and initiation fees checked-off from employees' wages. Monies deducted from employee's wages are held in trust for remittance to Local 947. It would have thus been unlawful for Medco to remit these amounts to any entity other than Local 947. Additionally, the Fund would have been in violation of ERISA and the terms of its tax exempt status had it accepted amounts beyond those amounts it required employers pay for the provision of benefits. The Fund may not simply collect monies in addition to the amounts it sets for employers to pay for the provision of benefits.

Accordingly, petitioners have been ordered to pay over to the Fund amounts (i.e., Medco's fees) that the Fund could not have lawfully accepted had they been tendered by petitioners to the Fund at the time petitioners received them from their employer clients. This illogical, but inescapable, conclusion is

the result of the mechanical application of the governing documents test ignoring the functional and economic realities of the parties' relationship.

The Government's approach also disregards the economic and practical realities of the parties' relationship. The Government and the Second Circuit simply disregard that Medco was the collective bargaining representative for the employers.

This is not a case where the Fund was pillaged or benefits were denied to participants. Rather, the opposite is true; the Fund thrived during the time Medco represented the employers. Medco performed a very valuable service for its clients for which it had negotiated, and was entitled to receive, a fee. Neither the Fund, Local 947, Medco nor the employers ever considered Medco's fees to be plan assets. Moreover, a fair review of the relevant documents and the functional and economic realities of the parties' relationships clearly proves that Medco's fees were not, and could never be considered, Fund assets. Yet, the Second Circuit, ignoring these facts and relying instead solely upon the Fund's trust indenture and a few selected passages from the collective bargaining agreement, concluded that Medco's fees are plan assets. This conclusion, in light of the vast evidence to the contrary ignored by the Second Circuit, is both arbitrary and unjust.

In sum, the Supreme Court must adopt the standard advocated by the petitioners which will take into account the realities of the relationship between the parties.

B. The Government's Opposition Brief Provides Further Support That The Second Circuit Misinterpreted And Misapplied The Law Regarding The Conduct That Makes An Individual A Fiduciary Under ERISA.

In its Opposition Brief, the Government alleges that petitioner Goldstein is personally liable for all the fees that Medco received resulting from Goldstein breaching his fiduciary duty. Under ERISA, the DOL's regulations and this Court's decisions, an individual can only be held liable as a fiduciary to

the extent that he exercised authority or control regarding matters relating to an ERISA plan. 29 U.S.C. § 1002(21)(A); 29 C.F.R. 2509.75-8, FR-16; *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993). Thus, Goldstein can be liable as a fiduciary only in those instances where he set personally Medco's fees.

The Government's sole proof that Goldstein set Medco's fees is based on Goldstein's deposition taken on July 18, 1996. Goldstein was asked by the DOL who set Medco's fees "at that time." Goldstein responded "Me." The Government claims that Goldstein's answer is most "naturally read as an admission that he set fees during the time that he was President [of Medco]" Gov't Opp. Brief 11-12. The petitioners believe that Goldstein's answer cannot be "naturally read" to mean that "at that time" referred to the time period that he was President. There is simply no reference in the subject question, or any of the preceding questions, to the period that Goldstein was President. The phrase "at that time" is ambiguous and could refer to any time period before the deposition.

Faced with no evidence of any specific instances in which Goldstein set Medco's fees, the Government argues that the petitioners presented no proof that someone else set Medco's fees Gov't Opp. Br. 12. In effect, the Government is now arguing, for the first time, that the Government does not have to prove that an individual has committed the acts for which he is alleged to be liable, but that the individual must prove that he did not commit the acts. This proposition contradicts the fundamental nature of this country's system of jurisprudence that a plaintiff in a civil action must prove its case rather than a defendant having to disprove the plaintiff's allegations.

Moreover, Goldstein was found liable for the period from March 1, 1991 through February 28, 1997. Since Goldstein's was no longer Medco's President in March, 1996 and since Goldstein's deposition was in July 18, 1996, the Government, again for first time, is forced to raise new arguments on how Goldstein could be liable after March, 1996 and after July 18, 1996. The Government alleges that Goldstein

would be liable in all instances where he did not set Medco's fees because he "knew of Medco's breaches and either enabled Medco to commit them or failed to remedy them [citations omitted]" Govt. Opp. Br. 12. The Government further alleges that Goldstein is liable because he retained "indirect control" over Medco because his brother became Medco's President and his spouse and sister-in-law where the sole shareholders. *Id.* The Government never explains how Goldstein retained indirect control because of his relationship to these individuals or what control Goldstein retained. These new arguments by the Governments were never presented to either the District Court or the Second Circuit. Moreover, there is no proof in the record to substantiate that Goldstein knew of any, some or all of Medco's breaches, enabled Medco to commit the breaches or exercised indirect control over Medco. At the very least, there are triable issues of fact regarding these new allegations.

C. A Permanent Injunction Should Not Have Been Granted Against Goldstein

In its opposition brief, the Government argues that a permanent injunction was properly granted, without a hearing, against Goldstein because Goldstein's conduct was not in dispute. Goldstein's conduct, however, is in dispute. Moreover, the Government never states what the standard should be for granting a permanent injunction.

The petitioners argue that the permanent injunction was improperly granted without a hearing. As indicated, *supra*, there is a dispute as to the role Goldstein played in setting Medco's fees as well as the time period involved in which he may have set the fees. Moreover, the Government states that Goldstein's action were intentional and demonstrate a "continuing insensitivity to ERISA's requirements" Gov't Opp. Br. 13. Whether Goldstein intentionally violated ERISA is a fact question which requires a hearing. In addition, there is no evidence that Goldstein had or has a "continuing insensitivity" toward ERISA *Id.* In fact, Goldstein was no longer Medco's President after March, 1996. Thus, there is at least a factual question of Goldstein's alleged "continuing insensitivity." *Id.*

An issue also exists regarding the standard that should be used by a court to issue a permanent injunction. The Government does not indicate the standard that should be used. One of the reasons that the Government does not advocate a standard is that under any standard that it proposes, the Government's position would be inconsistent with that standard because of the fact that it did not seek to have the Trustees of the Fund, all of whom knew what Medco was doing and approved of Medco's actions, removed as Trustees while it sought to have Goldstein permanently enjoined from providing services to any ERISA plan. The petitioners believe that a permanent injunction can be issued only where a party has engaged egregious misconduct in violation of ERISA, of which there is no evidence in this case.

The petitioners contend that the Supreme Court must require that a hearing be held before a permanent injunction be issued where there are triable issues of fact. The Supreme Court also must hold that a permanent injunction can be issued only where a party has engaged in egregious misconduct in violation of ERISA.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Supreme Court grant certiorari in this matter.

Respectfully submitted,

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